EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down. or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

No. 8976

United States Circuit Court of Appeals

For the Ninth Circuit.

TWIN HARBOR STEVEDORING & TUG COMPANY, a Corporation, and FIREMAN'S FUND INSURANCE COMPANY, a Corporation,

Appellants,

vs.

WM. A. MARSHALL, Deputy Commissioner Fourteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and OTTO HUGO,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

COUNSEL OF RECORD.

For Complainant and Appellant:

BOGLE, BOGLE & GATES,
STANLEY B. LONG,
Central Building,
Seattle, Washington.

For Defendants and Appellees:

J. CHARLES DENNIS,
United States Attorney,
P. O. Building,
Seattle, Washington.

OLIVER MALM,
Assistant United States Attorney,
P. O. Building,
Tacoma, Washington.

In the District Court of the United States, for the Western District of Washington, Southern Division.

In Equity. No. 615.

TWIN HARBOR STEVEDORING & TUG COMPANY, a corporation, and FIREMAN'S FUND INSURANCE COMPANY, a corporation,

Complainants,

vs.

WM. A. MARSHALL, Deputy Commissioner Fourteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and OTTO HUGO,

Defendants.

BILL OF COMPLAINT.

Come now the complainants above named, and for a bill of complaint against the defendants, allege:

I.

That the complainant Twin Harbor Stevedoring & Tug Company is now and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of Washington, and an employer within the provisions of the Longshoremen's and Harbor Workers' Compensation Act, hereinafter referred to as the "Act".

II.

That the complainant Fireman's Fund Insurance Company is now and at all times herein mentioned

was an insurance company organized as a corporation under and by virtue of the laws of the State of California, and the insurance carrier secured by the complainant Twin Harbor Stevedoring & Tug Company, a corporation, in accordance with the provisions of the Act.

III.

That the defendant Wm. A. Marshall is now, and at all [1*] times herein mentioned was, the Deputy Commissioner of the Fourteenth Compensation District under the provisions of the Act.

IV.

That the defendant Otto Hugo, hereinafter referred to as the "claimant", was at the time of receiving the personal injury hereinafter referred to, an employee of the complainant Twin Harbor Stevedoring & Tug Company, a corporation, within the provisions of the Act.

V.

That on the 2nd day of December, 1935, the claimant was in the employ of the complainant Twin Harbor Stevedoring & Tug Company, a corporation, on board the Steamship Yoshu Maru, in the harbor of the City of Hoquiam, State of Washington, and while so employed as a stevedore foreman, sustained personal injury thereon.

VI.

That at the time of said injury, claimant was earning and receiving from the complainant Twin

*Page numbering appearing at the foot of page of original certified Transcript of Record.

Harbor Stevedoring & Tug Company, a corporation, the sum of $325.00 per month. That following said injury, complainants furnished claimant with medical treatment, etc., in accordance with Section 7(a) of the Act. That from the date of said injury to and including the 2nd day of August, 1937, complainants paid to claimant as compensation pursuant to said Act the sum of $25.00 per week, and have paid to said claimant the total sum of $2,175.00.

VII.

That on or about the 1st day of February, 1937, claimant was re-employed by complainant Twin Harbor Stevedoring & Tug Company, a corporation, as stevedore superintendent, at a salary of $325.00 per month, and that ever since said date and now claimant has and is receiving from said complainant as compensation for his [2] services as stevedore superintendent said sum of $325.00 per month. That said claimant is a competent, capable and experienced stevedore superintendent; that his services in connection with this work are of the reasonable value of $325.00 per month, and that claimant is physically able to carry on this work as stevedore superintendent, although his said injury, sustained as aforesaid, has resulted in the partial loss of his voice.

VIII.

That on or about the 19th day of October, 1937, a hearing on said claim was held pursuant to the provisions of said Act, before the defendant Wm. A.

Marshall, as said Deputy Commissioner, and a subsequent hearing thereon in accordance with said Act was held on the 12th day of November, 1937, resulting in a compensation order and award of compensation being filed by said Wm. A. Marshall, as said Deputy Commissioner, in his office, on the 22nd day of November, 1937, a copy of which compensation order and award is attached hereto, marked Exhibit "A", and by this reference made a part hereof as though fully set forth. That a certified copy of the transcript of the testimony taken at said hearings, together with all exhibits filed and received in evidence in connection therewith will be filed in this cause under the certificate of said Deputy Commissioner, and are by this reference made a part hereof as though fully set forth.

IX.

That said compensation order and award of compensation is not in accordance with law and the provisions of the Act in this: that it appears from the evidence adduced at said hearings that claimant has recovered from the effects of his said injury, with the exception of a partial loss of his voice, which condition will be permanent; that claimant is physically able to perform the work [3] of longshoring, and is actually performing the work of stevedore superintendent, earning as a result of said services the sum of $325.00 per month, and has therefore sustained no wage loss or diminution of earning

capacity as the result of said injury since the 1st day of February, 1937, or at the present time.

That since claimant's return to work on the 1st day of February, 1937, the complaint Twin Harbor Stevedoring & Tug Company has paid to claimant the sum of $325.00 each month, and in addition thereto the sum of $25.00 per week as compensation under said Act, to and including the 2nd day of August, 1937. That said Deputy Commissioner arbitrarily and capriciously refused to allow complainants a credit on account of the compensation paid during the period that claimant was usefully employed and earning the sum of $325.00 per month; as a result thereof claimant has since the 1st day of February, 1937, until the 2nd day of August, 1937, received and earned his full salary as stevedore superintendent, in addition to receiving compensation under the terms of said Act as hereinbefore mentioned. That said claimant's present wage earning capacity, in the same employment in which he was engaged at the time of his injury, or otherwise, is equal to his wage earning capacity at the time of his said injury, and that said compensation order and award in awarding claimant compensation from the 1st day of February, 1937, and in the future, is contrary to law and the provisions of said Act.

That said claimant is a competent, experienced stevedore, stevedore foreman, and stevedore superintendent; that since the 1st day of February, 1937, and now, claimant has an earning capacity equal to

his earning capacity at the time of his said injury, and is capable of and is actually earning an amount equal to that which he earned and received at the time of his said injury. [4]

That the findings of fact of said Deputy Commissioner, contained in said compensation order and award, are wholly unauthorized and unjustified by the testimony adduced at said hearing, and were and are arbitrary, capricious and contrary to law.

X.

That by virtue of the terms and provisions of said Act the complainants herein were entitled to be given full credit for all of the earnings of said claimant since February 1, 1937. That the annual earnings of said claimant since February 1, 1937, are equal to his annual earnings prior to and at the time of his said injury. That the said claimant was and is not entitled to any monetary award, and that claimant failed to establish at said hearings any loss of earning capacity upon which an award for compensation could be lawfully based.

XI.

That said compensation order and award is not in accordance with law, and that the same should be suspended and set aside. That less than thirty days have elapsed since the date of entry of said order, and that the plaintiff has no plain, speedy or adequate remedy at law.

XII.

That if complainants are compelled to pay said compensation as provided by said award, they will suffer irreparable damage. That if complainants are required to pay said compensation prior to the final termination of this action, and if the same should be disbursed by claimant prior to the determination thereof, and if this action should be determined in favor of claimants herein and the award set aside, claimants would have no remedy in law or equity for the recovery of said payments of compensation so made in pursuance of said order. That in order to prevent irreparable damage [5] to complainants, it is necessary that the payment of said award be stayed, pending the outcome of the above entitled action, and the complainants are entitled to have said Deputy Commissioner restrained from enforcing payment of said award pending the outcome of the above entitled action.

Wherefore, complainants pray for judgment as follows:

1. That a decree be entered adjudging said compensation order and award dated November 22, 1937, and attached hereto and made a part hereof as Exhibit "A", to be unlawful and contrary to the provisions of said Act, and directing that said award be suspended and set aside, and for such other, further or different relief as to the court may seem equitable and just.

2. That the payment of the amount required to be paid by complainants to claimant, pursuant to

said award, be stayed pending final decision herein, and that a decree be entered by the court enjoining said deputy commissioner from enforcing the payment required by said award.

BOGLE, BOGLE & GATES,
Solicitors for Complainants. [6]

United States of America,
State of Washington,
County of King—ss.

Stanley B. Long, being first duly sworn, on oath deposes and says:

That he is one of the solicitors for the complainants herein; that he makes this verification by authority for and on their behalf, and for the reason that none of the officers of said complainants reside in or are within King County or Pierce County, State of Washington; that he has read the foregoing Bill of Complaint, knows the contents thereof, and that the same is true as he verily believes.

STANLEY B. LONG.

Subscribed and sworn to before me this 21st day of December, 1937.

[Seal] A. C. SPENCER, JR.,
Notary Public in and for the State of Washington,
residing at Seattle. [7]

EXHIBIT "A".

United States Employees' Compensation Commission, Fourteenth Compensation District.

Case No. 27-501.

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act.

OTTO HUGO,

Claimant,

against

TWIN HARBOR STEVEDORING AND TUG COMPANY,

Employer,

FIREMAN'S FUND INSURANCE COMPANY,

Insurance Carrier.

COMPENSATION ORDER AWARD OF COMPENSATION.

Such investigation in respect to the above entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law,

The Deputy Commissioner makes the following

Findings of Fact

That on the 2d day of December, 1935, the claimant above named was in the employ of the employer above named at Aberdeen, in the State of Washington, in the Fourteenth Compensation District,

established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Fireman's Fund Insurance Company; that on said day claimant herein, while performing service for the employer upon the navigable waters of the United States, sustained personal injury resulting in his disability while he was employed as a stevedore foreman on board the Steamship "Yoshu Maru", said steamship being then moored to the Port Dock at Aberdeen, in the State of Washington; that while the claimant above named was so employed a pair of tongs attached to a cable became unfastened from a log and swung and struck the claimant on his neck, left shoulder and upper chest causing injury and resulting in his disability; that notice of injury was given within thirty days after the date of such injury to the Deputy Commissioner and to the employer; that the employer furnished claimant with medical treatment, etc., in accordance with section 7(a) of the said Act; that the average annual earnings of the claimant herein at the time of his injury amounted to the sum of $3,900.00; that as the result of the injury claimant was wholly disabled from December 2, 1935, to and including January 31, 1937, and he is entitled to 61 weeks' compensation, $25.00 per week for such disability; that at the time of his injury claimant was engaged at a monthly salary of $325.00 as a stevedore foreman whose duties were to supervise the work of longshoremen in loading

cargo into vessels; that as the result of his injury claimant sustained a [8] partial loss of his voice so that now he can whisper only, and he also suffers from shortness of breath upon exertion; that these disabilities seriously impair the claimant's efficiency as a foreman of longshoremen in loading cargo on vessels in that because of the noise caused by the operation of winches on said vessels the claimant is unable efficiently to orally direct the longshoremen in their work; that to also properly discharge his duties it is necessary for such a foreman to go to various parts of the vessel into which cargo is being loaded, this necessitating climbing up and down ladders leading to the various decks of a vessel; that because of these impairments the employer above named found it necessary subsequent to January 31, 1937 to employ another employee to assist the claimant in the discharge of the claimant's duties as a foreman superivising the loading of cargo on vessels; the earnings of the said employee assisting the claimant in the said duties averaging $150.00 per month; that during the month of July, 1937, the employer above named found it necessary to transfer the claimant to other duties because the disability of the claimant resulting from the said injury had so lessened the claimant's ability as a foreman as to make such a transfer necessary; that the wage-earning capacity of the claimant in the open labor market has been decreased from $75.00 per week to $34.62 per week, and the claimant is, therefore, entitled to receive as compensation two-

thirds of the difference between $75.00 per week and $34.62 per week or ⅔ of $40.38, being limited, however, to the maximum payable under the Act of $25.00 per week; that the claimant is, therefore, also entitled to receive 40 weeks' compensation at $25.00 per week covering the period from February 1, 1937, to and including November 7, 1937; that the disability of the claimant continued at the time of the hearing on November 12, 1937; that W. H. Abel, attorney, has rendered legal services to claimant of the reasonable value of $70.00 and he is entitled to a lien on compensation due claimant therefor; that the employer has paid $2125.00 to the claimant as compensation.

Upon the foregoing facts, the Deputy Commissioner makes the following

Award

That the employer, Twin Harbor Stevedoring and Tug Company, and the insurance carrier, Fireman's Fund Insurance Company, shall pay to the claimant compensation as follows: 101 weeks' compensation at $25.00 per week covering the period from December 2, 1935, to and including November 7, 1937, and amounting to the sum of $2525.00, less $70.00 to be deducted therefrom and paid W. H. Abel as his attorney; that the employer shall have credit on this award for $2125.00 previously paid to the claimant as compensation; that subsequent to November 7, 1937, the employer and insurance carrier shall pay to the claimant compensation bi-weekly

at the rate of $25.00 per week during the continuance of the claimant's disability.

Given under my hand at Seattle, Washington, this 22d day of November, 1937.

WM. A. MARSHALL,
Deputy Commissioner, Fourteenth Compensation District. [9]

PROOF OF SERVICE.

I hereby certify that a copy of the foregoing compensation order was sent by registered mail to the claimant, the employer and the insurance carrier, at the last known address of each as follows:

Mr. Otto Hugo, 2717 Cherry Street, Hoquiam, Wash.

Mr. W. H. Abel, Aberdeen, Wash.

Twin Harbor Stevedoring & Tug Co., Hoquiam, Wash.

Fireman's Fund Ins. Co., c/o Bogle, Bogle & Gates, Central Bldg., Seattle, Wash.

WM. A. MARSHALL,
Deputy Commissioner.

Mailed November 22d, 1937.

[Endorsed]: Filed Dec. 21, 1937. [10]

[Title of District Court and Cause.]

SUBPOENA IN EQUITY.

The President of the United States of America

To Wm. A. Marshall, Deputy Commissioner, Fourteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and Otto Hugo, Greeting:

You are hereby commanded that all excuses and delays set aside you be and appear within twenty days after the service of this subpoena at the Clerk's office of the United States District Court for the Western District of Washington, at Tacoma, Washington to answer unto the bill of complaint of Twin Harbor Stevedoring & Tug Company, a corporation, and Fireman's Fund Insurance Company, a corporation, Complainants, in said Court exhibited against you. Hereof you are not to fail at your peril, and have you then and there this writ.

Witness the Honorable Edward E. Cushman, United States District Judge at Tacoma, Washington this 21st day of December A. D. 1937.

[Court Seal] EDGAR M. LAKIN,
Clerk.
By E. W. PETTIT,
Deputy Clerk.

Memorandum.

The Defendants in this case are required to file their answers or other defenses in the Clerk's office of said Court, on or before the twentieth day after

service of this writ, excluding the day thereof; otherwise the Bill may be taken pro confesso.

BOGLE, BOGLE & GATES,
Central Building,
Seattle, Washington,
Attorneys for Complainants. [11]

RETURN ON SERVICE OF WRIT.

United States of America,
Western District of Washington—ss:

I hereby certify and return that I served the annexed Subpoena in Equity on the therein-named Otto Hugo by handing to and leaving a true and correct copy thereof with him personally at Hoquiam in said District on the 30th day of December, A. D. 1937.

A. J. CHITTY,
U. S. Marshal.

[Endorsed]: Filed Dec. 31, 1937.

RETURN ON SERVICE OF WRIT.

United States of America,
Western District of Washington—ss:

I hereby certify and return that I served the annexed Subpoena in Equity on the therein-named William A. Marshall, Commissioner Fourteenth Compensation District by handing to and leaving a true and correct copy thereof with him personally at Seattle, Washington in said District on the 22nd

day of December, A. D. 1937, together with a copy of Complaint.

Marshal's fees $2.20.

A. J. CHITTY,
U. S. Marshal,
By MICHAEL GREEN,
Deputy.

[Endorsed]: Filed Dec. 31, 1937.

[Title of District Court and Cause.]

MOTION FOR ORDER OF DISMISSAL.

Comes now William A. Marshall, one of the above named defendants, by J. Charles Dennis, United States Attorney, and Oliver Malm, Asst. United States Attorney for the above district, and moves the court for an order dismissing the complainants' bill herein upon the ground and for the reason that said bill fails to state facts sufficient in equity or in law, to entitle the complainants to the relief prayed for, or for any relief;

Upon the further ground that the complainants' bill herein, taken together with the certified record of said Wm. A. Marshall, as Deputy Commissioner of the U. S. Employees' Compensation Commission, affirmatively establishes that there was competent evidence to support the findings and award of said Wm. A. Marshall as such Deputy Commissioner, which is sought to be enjoined herein.

This motion is made upon the records and files herein, but in the event this Motion is over-ruled, the defendant, William A. Marshall prays leave to answer herein on the merits.

Dated this 11th day of January, A. D. 1938.

J. CHARLES DENNIS,
United States Attorney.
OLIVER MALM,
Asst. United States Attorney.

Copy received Jan. 13, 1938.
BOGLE, BOGLE & GATES.

[Endorsed]: Filed Jan. 5, 1938. [12]

[Title of District Court and Cause.]

STIPULATION.

It is hereby stipulated by and between the Twin Harbor Stevedoring & Tug Co., and the Firemens' Fund Insurance Co., by Bogle, Bogle & Gates, their counsel, and William A. Marshall, Deputy Commissioner of the U. S. Employees Compensation Commission, by J. Charles Dennis, United States Attorney, and Oliver Malm, Asst. United States Attorney for this district, that the record of all proceedings had before William A. Marshall, as Deputy Commissioner of the U. S. Employees Compensation Commission, 14th District, consisting of the following:

1. Transcript of testimony taken before Wm. A. Marshall, Dep. Comm., on October 19, 1937, at Aberdeen, Wash.,
2. Transcript of Testimony taken before Wm. A. Marshall, Dep. Comm., on November 12, 1937, at Aberdeen, Wash.,
3. Original compensation order and award of compensation made by Wm. A. Marshall as Dep. Comm., on November 22, 1937, at Seattle, Wash.

heretofore filed herein may be considered as a portion of the record herein in conjunction with plaintiffs' bill of complaint for the purpose of the court's consideration of the Motion to Dismiss heretofore filed herein by the defendant William A. Marshall.

Dated this 21 day of February, A. D. 1938.

BOGLE, BOGLE & GATES,
By STANLEY B. LONG.

J. CHARLES DENNIS,
United States Attorney.
OLIVER MALM,
Asst. United States Attorney.

[Endorsed]: Filed Feb. 26, 1938. [13]

I, William A. Marshall, Deputy Commissioner, District No. 14, for the United States Employees' Compensation Commission, hereby certify that the following documents constitute the record in the case of Otto Hugo, Case No. 27-501.

Correct transcript of all testimony taken before me on October 19, 1937;

Correct transcript of all testimony taken before me on November 12, 1937;

Original compensation order and award of compensation filed by me on November 22, 1937.

In tendering the record to the court it is desired that appropriate reservation be made to provide for the return to the Deputy Commissioner of all original documents and papers when they have served the purposes of the court in this case.

WM. A. MARSHALL,
Deputy Commissioner, District No. 14, U. S. Employees' Compensation Commission.

Government Exhibit. [14]

United States Employees' Compensation Commission Before Wm. A. Marshall, Deputy Commissioner, Fourteenth Compensation District.

Case No. 27-501.

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act.

OTTO HUGO,

Claimant,

against

TWIN HARBORS STEVEDORING & TUG COMPANY,

Employer,

FIREMAN'S FUND INSURANCE COMPANY,

Carrier.

Pursuant to notice, this matter was heard before Wm. A. Marshall, Deputy Commissioner, United

States Employees' Compensation Commission, at Aberdeen, Washington, on the 19th day of October, 1937, at 1:00 o'clock P. M.

Appearances:

The Claimant appeared in person and by his attorney, Mr. W. H. Abel.

Mr. David Child, of Messrs. Bogle, Bogle & Gates, attorneys-at-law of Seattle, Washington, appeared on behalf of the Employer and Insurance Carrier. [16]

Mr. Marshall: We can shorten this process by some stipulation, I take it.

It is stipulated by the parties that the Claimant sustained an injury on December 13, 1935, as set forth in his application; that both the employer and the employe were subject to the Longshoremen's and Harbor Workers' Compensation Act at the time of the injury; that the relationship of employer and employe existed at the time of the injury; that at the time of the injury the employe was performing services growing out of and incident to his employment; that the average annual earnings of the Claimant at the time of the injury amounted to the sum of $3,900; that the employer has paid $2,125 to the Claimant as compensation.

The question at issue is the disability of the Claimant as a result of his injury.

OTTO HUGO,

the claimant, called as a witness, being first duly sworn, testified as follows:

Direct Examination

By Mr. Abel:

Q. What is your name?

A. Otto Hugo.

Q. Mr. Hugo, what physical disability, received from the injury, do you still have?

A. Just exactly the same as when I started. I can't talk, [17] I can't holler at the crew. I can't tell my men what to do or nothing. My voice sounds pretty good in a quiet room, but when the winches are going it doesn't sound so good.

Q. Proceed.

A. And giving orders to the men like I have done for the last twenty-five years, I stand on the deck and go to the hold, I can motion is all I can do, and if they don't understand I have got to go down in the hold and tell them, get them to one side and whisper in their ear; or if it is on the deck I have got to take them into the alley way and talk to them, or get them in a quiet room, the mate's room or something.

Mr. Marshall: Q. Your reason for doing that is because the winches are operating?

A. They are going all the time; the winches are going, and if I want to tell a driver something I have to do it through somebody else; I can't talk loud enough so they can hear it; I have to get alongside of him and tell him in a whisper.

(Testimony of Otto Hugo.)

Q. It might be well for the record, Mr. Hugo, if you will tell us how your injury occurred, just roughly.

A. Pulling a log with tongs and the tong pulled out and hit me.

Q. Were the tongs on a chain or cable?

A. On a cable.

Q. And what did the tongs and the cable do to you? [18]

A. They hit the house first or it would have taken my head off, and bounced back and broke my shoulder and took my larynx, smashed it completely.

Q. It crushed your voice box?

A. Yes. The air would go in, I could breathe in but I couldn't breathe out. I kept getting bigger and bigger, all bloated up, until they cut me open.

Q. Has there been very much change in your voice since the injury?

A. No, it was the same way. One cord is gone completely. When this sling hit it, it smashed the cord and it is gone and the other one is injured, and it stays over to one side.

Q. How long after your injury were you off from work, or do you recall that?

A. Well, it was almost a year, about a year.

Q. Then that would make it December, 1936, that you went back to work?

A. Yes, just about.

(Testimony of Otto Hugo.)

Q. Do you recall generally when he returned to work, Mr. Hill?

Mr. Hill: No, I don't have that record. I think it was in February of this year.

Mr. Marshall: He says he thinks it was in February.

Mr. Child: Mr. Hill here states that he went to work in February at $325 a month but he had done some work previous to that. [19]

The Witness: I can tell you pretty close. The 1st of October.

Mr. Marshall: Q. What about the 1st of October?

A. I went around these ships and tried to see what I could do, to get used to it.

Mr. Abel: And were you paid for your services in trying to see what you could do?

A. Not a salary but just—I don't know. He gave me $150 or something like that.

Q. No definite salary?

A. No.

Mr. Child: You got some pay during December and January?

A. Yes.

Q. And that was the first pay you got since the injury?

A. The first of October.

Mr. Marshall: Then, you returned to your work on February 1, 1937?

A. Actual work, yes, the first actual job, yes.

(Testimony of Otto Hugo.)

Q. Have you been able to perfrom your duties, your duties are those of a ship foreman or what do you call it?

A. Foreman, yes.

Q. Steam foreman?

A. Yes.

Q. Do you have to have any assistance in your work now?

A. Yes, always to have a helper after that. [20]

Q. You must explain to us about that, please.

A. Before, I used to be able to talk to the ships and talk to about 60 or 65 men. Well, I found out that it was pretty hard for me to still talk to these 60 or 65 men. I would have to go up and down the hold and I can't do it. My wind pipe has been cut so my throat is smaller, so I get exhausted. I have to have assistance, and Mr. Hill gave me an assistant. He is sitting over there.

Q. What is his name, please?

A. Algot Johnson. And he went to every ship, I had him go with me and I would tell him or write it down, whatever I wanted done, and he would go and talk to the ships around just like I used to do before.

Q. Now, has that employment continued right through, or has it changed?

A. I have, yes,—no, my position changed lately.

Q. When did your position change?

A. About Septemebr—the first of July.

(Testimony of Otto Hugo.)

Q. The first of July?

A. Yes.

Q. What work do you do now?

A. Well, just going around and just looking after the ships. It is easier for me.

Q. Is it kind of a broader supervision than it was before? Do you have different duties? [21]

A. Well, a kind of a political job, I call it. Sympathetic job, you might say.

Mr. Child: What?

A. Sort of a sympathetic job, I think.

Mr. Abel: Q. Do you mean you are furnished that job just to help out?

A. Appears that way to me. I have been with the Company ever since it was organized.

Mr. Marshall: Q. Going back a minute to this time when Mr. Johnson assisted you, what wages or salary was paid him for his work?

A. He got paid by the day.

Q. Have you any idea what he made a month?

A. Call him over and ask him.

Q. We will get that afterwards.

A. He was paid by the shift, so much an hour.

Q. He assisted you?

A. Yes. No monthly salary, but so much every shift, so much a day or so much an hour.

Q. Starting with February and for some time thereafter, did he assist you on all the shipping work at that time?

A. Every ship.

(Testimony of Otto Hugo.)

Q. And did that continue up until July 1?

A. I wouldn't say every ship. Sometimes there was other foremen; there might be other foremen available and they [22] would be sent out with me, understand.

Q. What salary would these other foremen get, per month, upon occasions when they worked with you?

A. $250 a month and overtime, which amounted to about $30 a month.

Q. Now, you kind of review this thing so we will have a clear understanding.

A. Telephone—if I want to telephone I have got to have somebody else do it for me, you know, regardless of where I go. If I lose this job tomorrow I would be absolutely—I left and tried to get my master's license, see what they had to say.

Q. You say you did try it?

A. Yes. I was a mate before I came here, mate on a ship. They said no, there are three things we have got to have: One is voice, and eyes and hearing. I can't get that.

Q. You can't get it?

A. In case these people close up, this job is not guaranteed to be forever.

Q. You say if you should for any reason lose your employment with the Twin Harbor Stevedoring & Tug Company would you be able to secure employment like that with some other employer?

A. No, absolutely.

(Testimony of Otto Hugo.)

Q. Why not? [23]

A. I can't do the work. They wouldn't give me $325 a month to do nothing, absolutely no.

Q. Suppose you couldn't get that kind of work, could you get or could you do general longshoring work?

A. No. I used to years ago. I was winch driver, and can't do that any more because you have got to holler "Look out below."

Q. How about working, carrying on any physical kind of work, anything like that?

A. I can do that all right.

Q. Would the impairment to your breathing affect you?

A. I would just stand it so long, is all.

Mr. Abel: Q. How long is that?

A. Oh, I imagine—

Mr. Marshall: As the boys use the expression, could you "get by" with that sort of thing?

A. If I stalled enough I might be able to make it. Just like going down below, I go down No. 2 hatch about 38 feet and by the time I get down there and come up again I have got to sit around about five minutes.

Q. Why?

A. Because I have to get my wind. I can't get it fast enough.

Q. Is your windpipe smaller?

A. Smaller. [24]

(Testimony of Otto Hugo.)

Q. Can you use the telephone since your disability?

A. No. I can use it to certain individuals. If I would call up my wife, she can understand me. Nobody else can.

Q. Before I came here today, just by pure chance, I learned you telephoned to the dispatcher, whatever you call it, hiring hall last night.

A. Yes.

Q. And he told me candidly he could understand you with the greatest difficulty, what you said. He said he knew the ship, you wanted three men.

A. Yes.

Q. He knew the ships and their requirements pretty well, otherwise he would have some difficulty knowing what you wanted?

A. Yes.

Q. His name is Lambert.

A. The fellow answered by the name of Benson. He said, "There is a drunk man on the phone and I can't tell what he is talking about. You better take it." Lambert took it.

Q. Suppose you were able to do—supposing you were dependent now on earning your living as a longshoreman and were able to do that work, what would the average per month wages be, year in and year out, the different years here? Can you give us a rough sort of an estimate?

A. About $80 a month, I imagine; possibly $100, not any more.

(Testimony of Otto Hugo.)

Q. Would you say it was possible to earn a little more [25] than that, probably recently?

A. In the last two months they have averaged $50 a month.

Q. That is probably because of these foreign conflicts that is affecting that?

A. There are no ships.

Q. What were the earnings last year?

A. Last year was pretty good, about $125. And there is another obstacle there, that is joining the Union. How are you going to get in that?

Mr. Abel: Leaving that out, assuming you could join the Union and there is no Union situation involved, could you earn a living as longshoreman?

A. No.

Q. And if not, why not?

Mr. Marshall: Physically able?

A. I don't think I could do it.

Q. Why not?

A. Well, just like—I don't know how you would explain it.

Q. If I understand your testimony correctly, your inability in attempting to do the work of a longshoreman is largely a matter of your breathing?

A. Yes.

Q. Violent exercise, you feel, might tax your ability to breathe? [26]

A. That is right.

(Testimony of Otto Hugo.)

Q. Now you say that recently your work is somewhat changed. Do you no longer stevedore the individual ships?

A. No, no more, not the individual ships, no more; just go around and look at the various ships that are in port and talk to the foreman, and maybe suggest something here and there, like that.

Q. Are you in fact kind of a superviser of these foremen, is that it?

A. That is about it, yes.

Mr. Marshall: Any more questions you want to ask, Mr. Abel?

Mr. Abel: I believe not.

Mr. Marshall: Mr. Child?

Cross-Examination

By Mr. Child:

Q. How old are you, Mr. Hugo?

A. Forty-six.

Q. How long were you working at longshoring?

A. I have been in that position since they started up, 1922 I think it was.

Q. Been in the position of foreman?

A. Yes.

Q. What was your experience before that? [27]

A. Mate on a ship.

Q. How long were you mate?

A. About seven years.

Q. And what did you do before that?

A. Before that I was longshoreman.

Q. Here in Aberdeen?

A. Yes.

(Testimony of Otto Hugo.)

Q. What years did you work as a longshoreman in Aberdeen?

A. Well, that is pretty hard to say. I started in there when I was about 15 years old for Pete Peasley.

Q. What class of ships were you mate on?

A. On sailing ships and steamers.

Q. Out of Grays Harbor?

A. All up and down the Coast.

Q. And you worked at that seven years, you say?

A. I got my license—I couldn't tell exactly; just about seven years.

Q. What year was it you began work for the Twin Harbors Stevedoring Company?

A. As soon as they opened up. Was that in 1922?

Mr. Marshall: 1923. Mr. Hill says it was 1923.

Mr. Child: Q. Did you begin with them as a foreman?

A. Yes.

Q. What were your wages there?

A. $175. [28]

Q. And they were gradually increased until $325?

A. Yes.

Q. How long did you earn $325?

A. The last four years.

Q. Entirely as a stevedore foreman?

A. Yes.

(Testimony of Otto Hugo.)

Q. Now, I would like to ask you a little more about the duties of a foreman. As foreman, you supervise the loading of the individual ships, as I understand?

A. That is it.

Q. If there are several ships in the harbor loading from your company, some other foreman attends to the loading of these ships?

A. Yes, some other foreman.

Q. As a foreman, do you do any manual labor?

A. No.

Q. You simply supervise and boss the stevedores?

A. Yes.

Q. Does that require you to circulate over the ship, about the ship a great deal?

A. Continuously, from hatch to hatch.

Q. Climbing up and down ladders?

A. Yes.

Q. How does your voice come into that, as such, the necessity for that? [29]

A. It is all your voice.

Mr. Marshall: Tell him so he will understand it, and so will I.

A. Everything has got to go by giving orders. For instance, you may want the lumber butted back that way. You have got to holler at them and tell them. You have got to holler to them, "Butt that up closer."

(Testimony of Otto Hugo.)

Q. Don't you give these orders with your hands, just as you are doing right now? Don't the hatch tenders give their orders by signals?

A. Yes.

Q. Isn't there a great deal of noise going on in the loading of a ship, winches running? Isn't it pretty difficult to give signals by voice at all?

A. No, sir. If you don't have a voice you might as well not be there.

Q. How does the hatch tender manage to give his signals without his voice?

A. Without voice—"Look out below". What are you going to do with it, "This way and that way", and everything else? The winch driver can't see down below. That is where his hands come in.

Q. So there is a set of hand signals for hatch tenders and winch drivers?

A. That is it. [30]

Q. And isn't that necessary because of the noise and the fact that the winch driver can't see down into the hold?

A. It is because the winch driver can't see. That is all.

Q. If the hatch tender's signals were given by voice, wouldn't it be almost impossible to operate?

A. No. We always used voice before, before we got two winches, used to have only one winch—"Go ahead a little bit." "Come back a little bit."

Q. Weren't those signals all given by hand?

A. No.

(Testimony of Otto Hugo.)

Q. But there was a set of hand signals used in lieu of vocal signals?

A. No question about that.

Mr. Marshall: Right there, then, I want to inquire: Is it true that this code of signals is limited to certain expressions?

A. That is all, just certain ones.

Q. Could that signal be used to tell them to butt that lumber up? Do you have any signal that would tell a man down there to do that?

A. No, no signal in the world. That is merely signaling them out of the hold, when you want them to stop, what you want to do with them.

Q. There are cases when it is necessary to talk?

A. Every day and every hour. You have got to go down and [31] tell them what to do. If it is another man takes these fellows, he just sings out what he wants done, and occasionally when he can't see under the hatch coaming, then he goes down to make sure they are doing it.

Questions by Mr. Child:

Q. After you recovered sufficiently to work I understand that you were foreman of several ships during December of 1936 and January, 1937?

A. Yes, sir.

Q. How did you get paid for those ships? By the hour or job or how?

A. They just gave me a check at the end of the month.

Q. But you were not on a regular salary of $325 per month?

(Testimony of Otto Hugo.)

A. No.

Q. And previous to December, 1936, you earned nothing after the accident?

A. How is that?

Q. You earned nothing previous to December, 1936, since your accident?

A. 1936—excepting two months, yes.

Q. When?

A. Excepting two months.

Q. Well, was that in the nature of a try-out for December and January?

A. Yes, just to see if I could do it. When I went on board [32] the ship I was so nervous I couldn't get near it.

Q. Who did you get to assist you on these ships?

A. This man here.

Q. You began to use him on deck?

A. Yes.

Q. What is his name again?

A. No, I used him previous to that.

Q. What is his name, now?

A. Algot Johnson. I used him before that, two years before that.

Q. When you wanted to give a signal or instructions to somebody in the hold, did you tell Mr. Johnson?

A. I take him off alongside, or to the mate's room, and tell him what to do.

Q. And he would go out and do it?

A. He would go out and do it or have it done.

Q. How did you happen to go to work on February 1 at your old salary of $325?

(Testimony of Otto Hugo.)

A. You will have to ask Mr. Hill that. I don't know. I don't even know why he is giving me this salary today.

Q. He evidently finds your work pretty satisfactory if he has someone assist you.

A. What is that?

Q. He evidently finds your work pretty satisfactory if he has someone assist you? [33]

A. Certainly. He is paying $10 a day for it.

Q. Does he continue to pay him?

A. He has been ever since I have been loading ships.

Mr. Marshall: Can you use the doctor now? He is here.

Mr. Child: Yes.

(The witness was temporarily excused.)

DR. M. W. BRACHNAEGEL,

called as a witness, being first duly sworn, testified as follows:

Direct Examination

By Mr. Marshall:

Q. Your name is Dr. M. W. Brachnaegel?

A. Yes.

Q. And I understand you are a regularly licensed and practicing physician in the state of Washington?

A. I am.

Mr. Marshall: Proceed.

(Testimony by M. W. Brachnaegel.)

Questions by Mr. Abel:

Q. Are you the physician and surgeon employed by the employer here?

A. I am.

Q. You know Otto Hugo, the claimant here?

A. Yes, I do.

Q. Did you treat him originally?

A. I did. [34]

Q. For the injuries complained of here?

A. Yes.

Q. Have you seen him recently?

A. Yes, I have.

Q. Have you examined him recently?

A. Yes, sir.

Q. What is his present condition, with respect to his injuries?

A. Well, he still bears the effect of the injury. He has a partial loss of voice and shortness of breath on exercise. Those are the two main things.

Mr. Marshall: What do you mean by shortness of breath?

A. Can't get his breath through the wind pipe.

Q. Because it is narrow?

A. Yes.

Mr. Abel: Q. Was it made smaller by the injury?

A. The injury cut off the passage of air through there. It became necessary to put a hole in there and put in a tube so he could get any air at all. We performed a tracheotomy and we left the tube in for several weeks, and that of course in a way

(Testimony by M. W. Brachnaegel.)

narrowed the trachea somewhat, and then he went to Seattle. I knew nothing about this, as somebody talked him into another operation up there, and they opened it up again and added more scar tissue, and I think he is much worse after the second operation than he was before. It was done in the [35] attempt, however, to help him.

Q. Well, to what extent has the larynx been injured or destroyed?

A. Well, it is hard for me to tell. Dr. Adams went over him thoroughly, and he had a portion of one vocal cord and a portion of the other, if I remember correctly, and then there was a stenosis or narrowing of the tube below that.

Q. How does it affect his ability to talk audibly?

A. You have to be right near him to get it. A great many times he has been in when he was unable to talk as well as he does today. If he gets tired using his voice, after he has been talking very long, his voice gets tired and gets so you can hardly understand him.

Q. To what extent has he lost his audible voice?

A. I think he has lost 90% of it, 90% of his audible voice. He has to talk in a whisper, which is not so very good.

Q. Will he ever be in better condition than now?

A. I think not.

Q. And why not, Doctor?

A. Because, ordinarily, if you are going to get a return to par you get it within a year's time—

(Testimony by M. W. Brachmaegel.)

between, from a period of three months, beginning it at six months, a little better, and if you don't get a complete return by a year you never get it.

Mr. Abel: I think that is all. [36]

Mr. Marshall: Q. What effect would this have upon his doing hard physical work such as a longshoreman? I mean, not on the docks, on his ability to speak, but this injury to the throat, from the standpoint of breathing?

A. His exertion, when he wants to talk he hasn't enough extra breath to make up for the exercise he has, he can't do it. It is just too small, this passage.

Mr. Marshall: Mr. Child, have you any questions?

Mr. Child: Nothing.

(The witness was excused.)

OTTO HUGO,

recalled as a witness, being previously sworn, resumed the stand for

Further Cross-Examination

By Mr. Child:

Q. Now, from the first of September on, do I understand you to say that you served as a foreman on specific ships?

Mr. Marshall: Individual ships.

A. February—July, I think it was.

(Testimony of Otto Hugo.)

Mr. Child: Q. Oh, July?

A. Yes, June and July.

Q. And during that period you had Mr. Johnson assist you?

A. Yes.

Q. Then your status was changed on July 1—June or July?

A. Yes. [37]

Q. And did you have a different title?

A. I don't know about the title. Nothing said. He just told me to go around and take it easy for a while.

Q. What did you do after July 1?

A. Not very much of anything, just go from ship to ship.

Q. What do you do when you go from ship to ship?

A. Well, ask the foreman what he wants. If I knew more than he did about loading I would suggest that.

Q. Did you find that you did know more than they knew quite frequently?

A. No, because there is only three of them and we have been working together for seventeen years and we just about know each other's mind.

Q. They are not as thoroughly skilled in the business as you are, are they?

A. I had to ask them to go to one side, the same way, if there is something.

(Testimony of Otto Hugo.)

Q. But they take instructions from you as to the various things about handling these ships?

A. A few things, yes.

Q. You don't need the assistance of Mr. Johnson at this time?

A. No.

Q. You are still employed in that capacity?

A. Yes. [38]

Q. There has nothing been hinted or suggested about your employment not continuing, has there?

A. Of that I haven't any idea. It just came onto me out of a clear sky.

Q. How many ships a month have you been superintending?

A. What?

Q. How many ships a month have your operations covered since July?

A. Six or eight, I guess; pretty slack.

Q. Six or eight a month?

A. Yes.

Q. Do you frequently have more than one ship in port at one time?

A. Oh, yes, most always.

Q. Most always?

A. Most always.

Q. So that it is necessary for you to superintend the loading of two or more ships at the same time?

A. Yes.

Q. How do you travel from one ship to another?

A. By automobile.

(Testimony of Otto Hugo.)

Q. Do you use gear that belongs to the Twin Harbors Stevedoring Company?

A. Yes.

Q. Whose job is it to inspect that gear and see that it is [39] all right?

A. We have a gear man for that.

Q. Do you supervise the gear man?

A. He takes care of that. He has been there for years.

Q. You never pay any attention to the gears yourself?

A. No, he has got all of that taken care of himself—him and his helper.

Q. Who buys the gear?

A. Mr. Hill—no, Mr. Owens.

Q. You have nothing to do with that?

A. No.

Q. Do you have period of leisure between ships?

A. Yes, quite a bit of leisure; too much nowadays.

Q. Vacations between?

A. Yes.

Q. What do you do on those days?

A. Well, I don't know; most anything.

Q. Stay at home?

A. Either that or fool around the gear locker, patching up our stowing machines or something to that effect?

Q. That is not under the care of the gear man?

A. That is all under his care. I don't have to do that, but I do it voluntarily.

(Testimony of Otto Hugo.)

Q. So that you do have some care of the gear and the equipment? [40]

A. No, nothing whatever.

Q. Didn't you just say you put in those days?

A. Voluntarily, I said. The last spell we had about a week ago, seven or eight days we had nothing to do.

Q. Is your work entirely confined to Grays Harbor?

A. And Willapa Harbor.

Q. You never go up to Tacoma or other points?

A. Oh, I made one trip up there. Mr. Hill told me to go to these various places and see how they worked; if they worked any different than we did.

Q. So you were on a tour of inspection?

A. I didn't make very good on it because I had to talk to these foremen on the ships and there was too much noise, have to get them up alongside, and they were all strangers to me.

Q. Is it true you are a very well-known man in this line throughout the Northwest?

A. Grays Harbor.

Q. Throughout the Northwest; aren't you well known in Tacoma and Seattle?

A. Not well known; never was in Tacoma in my life.

Q. Aren't you well known there? Don't you know all the stevedores in this section of the state?

A. No, sir, I don't know a one on the Sound outside of Mr. Stewart.

(Testimony of Otto Hugo.)

Q. Besides Mr. Stewart. [41]

A. I know very few of the men that work there.

Q. What?

A. I know a few of the men that work on the Sound—a very few.

Q. If it were true that a casual inquiry in Seattle among the stevedores brought out the response that you were a sort of super-foreman, better than any other foreman, and the Daddy and the boss of them all, how would you account for that?

Mr. Abel: I object to that as not cross examination.

A. I wouldn't account for it. I used to be a crackerjack here in Grays Harbor.

Mr. Child: Aren't you a crackerjack in Grays Harbor now?

A. I was.

Q. Aren't you now?

A. I was. I am not now.

Mr. Abel: Just answer the question.

A. I was. I am not now.

Mr. Child: Q. Don't you know more about loading ships than any man in Grays Harbor today?

A. No.

Q. Don't you know as much as anybody does?

A. I know my job, is about all.

Q. How many men in Grays Harbor are there whom you would recognize as your superior?

A. I could recognize quite a few as my equal.

(Testimony of Otto Hugo.)

Q. Who are they? [42]

A. You want their names?

Q. Yes.

A. Billy Dean, Fred Hedin, and let's see—Rosenthal and another fellow I can't think of his name—Al Johnson is one, and Emil Hess. That is all there is left here now.

Q. Who do these men work for?

A. Delanty and the Twin Harbor, both.

Q. How much are they paid?

A. I haven't the slightest idea.

Q. Are you sure of that?

A. Yes.

Q. Didn't you ever talk to them?

A. I know our foremen, what they are paid.

Q. How much is he paid?

A. $250 and overtime.

Q. Isn't there any foreman in Grays Harbor that is paid as much as you are?

A. I don't believe so.

Q. You don't believe so?

A. No.

Q. Why are you the highest-paid man in Grays Harbor?

A. I am the oldest in the employ.

Q. You are not paid because of your superior ability?

A. I don't think so.

Q. You don't think so? [43]

A. Certainly.

(Testimony of Otto Hugo.)

Q. Do you know of some men who are paid $325 a month that are not earning it? You can't think of any?

A. That is a pretty funny way you are putting it. Explain what you mean.

Q. I want to ask you how many men in your acquaintance are paid $325 a month and are not earning it?

A. Well, I can tell you what the man—not $325, but I can tell you men that get $95 and $105 that don't earn it.

Q. But you can't think of any that get $325 without earning it?

A. No.

Q. Are Frank Hill and Dan Hill quite noted for their philanthropy?

A. As far as I am concerned they certainly are, Mr. Frank Hill.

Q. What philanthropy does he engage in?

A. He certainly did me well when I was laid up.

Q. What did he do for you while you were laid up?

A. Took care of my wife, what she wanted; anything she needed, she got it.

Q. How much did she get?

A. I couldn't say offhand.

Q. Do they carry on their philanthropy in any other way, to your knowledge? [44]

A. It is not for me to say because I don't know.

Q. You said a while ago——

(Testimony of Otto Hugo.)

A. (Interrupting) Suppose I had lost my leg, and I came back and got the same job from them, the leg would still be gone, wouldn't it?

Q. Well, that is something that I——

A. It would still be gone, wouldn't it? I come back with my voice gone; I got the same job back. The voice is still gone, isn't it?

Q. Yes, we are not complaining about your voice. I am trying to get at what you draw your pay for.

A. There is only one way you can find out, and that is you will have to ask Mr. Frank Hill.

Q. Did you ever work for Delanty?

A. Yes.

Q. When did you work for him?

A. After I worked for Mr. Peasley, when I was a young fellow.

Q. What kind of work did you do?

A. I was loading nothing but sailing ships.

Q. When did you work for him?

A. That is pretty hard to tell but it was a few years.

Q. A few years?

A. I was coming up then as boss. I would have been the next boss, but I went to sea then. [45]

Q. Did you work as foreman for them?

A. During those days I was the same as a foreman, just one hatch to load.

Q. What did you get paid then?

A. Well, the general—

(Testimony of Otto Hugo.)

Q. (Interrupting How much did you earn while you were there; what were your average earnings?

A. Fifty cents an hour or sixty cents an hour in those days.

Q. How did your earnings compare with other men in those days?

A. Well, in them days we had five or six schooners in at a time.

Q. How did your earnings compare with other men, other foremen?

A. About a stand-off.

Q. Weren't you paid more then than the other men got?

A. No, there was four or five ahead of me then in them days.

Q. Don't you think Mr. Delanty would hire you very readily now?

A. Not a chance.

Q. Did you ever ask him?

A. I did about twelve years ago one time. That was a long time ago. [46]

Mr. Marshall: Let me ask you if you understood his question: If Delanty would hire you now?

A. Yes.

Mr. Child: Q. Would Mr. Delanty hire you now if you applied to him for a place, would he hire you as ship foreman, do you think?

A. No, I couldn't work as ship foreman.

Q. Why couldn't you?

(Testimony of Otto Hugo.)

A. Well, I couldn't talk to them, tell them to do anything.

Q. Well, Mr. Hill is very glad to hire you at more than the average salary in spite of your voice. It seems to me there must be a reason for it?

A. I have been there for a good many years, you know.

Q. What?

A. I have been there for a good many years and done a lot of hard work.

Q. Doesn't that support the theory that you are a very good man?

A. I was pretty fair before I lost my voice, all right.

Q. You were pretty fair then?

A. Before I lost my voice.

Q. Weren't you an exceptionally good man?

A. Well—I don't like—that is patting myself on the back. I couldn't say that. That is for somebody else to say.

Q. Well, in your own mind didn't you consider yourself a [47] fair man, better than the average foreman?

A. I don't think so.

Q. Think of that; think again.

A. Well, them days are past.

Q. How long have you been earning $325 a month as foreman?

A. That was years ago when there was comparatively—

(Testimony of Otto Hugo.)

Q. (Interrupting) What is that?

A. That is years ago when we used to cut each other's throats.

Q. How long have you been earning $325 a month?

A. I think it is four years. I can't say positively.

Q. Right through the depression period?

A. No. We was laid off during the depression.

Q. You were laid off during the depression?

A. No, during the strike.

Q. You did pretty well through the depression, the national depression, didn't you; continued to draw your $325 a month?

A. The depression in 1929?

Q. It began, yes.

Mr. Marshall: What did you get from 1929 to 1933? Do you remember that?

A. I think it was $225 or $250.

Mr. Child: Q. Did you ever at any time have a reduction in salary? [48]

A. No.

Q. You have had steady increases?

A. Yes, been raised but they are little increases.

Q. You started at $150 or you started at $175; you think in 1929 you were getting $225?

A. I believe that is right.

Q. When did you get the next raise?

A. Well, that is hard to tell. Superintendent—had a superintendent by the name of Frank Lund.

(Testimony of Otto Hugo.)

He used to give us those raises whenever he would go and get drunk. That would come spasmodically.

Q. You had several of those raises over that time?

A. All $10 raises.

Q. And you got up to $325?

A. I got up to $300.

Q. When did you get up to $325?

A. Well, that was—we had a superintendent by the name of Frank Lund and Mr. Hill fired him, and he gave me $325 then, and he gave everybody a raise. They paid us his salary because he was never on the job.

Q. You got a raise when Lund left?

A. Yes.

Q. When he was sober was he doing the same work you are doing now?

A. He didn't do nothing. [49]

Q. He didn't do anything?

A. Dressed up and walking around; he used to sign the checks. That is all he did.

Q. So they let him out and kept you, because you were a better man?

A. No, this fellow went off and got drunk and he was gone for two or three months and they gave him two weeks' notice when he came back and he was gone; they fired him.

Q. You are not a drinking man yourself?

A. Oh, yes, once in a while.

(Testimony of Otto Hugo.)

Q. But it does not interfere with your duties?

A. Never.

Q. Frank Lund has been gone for a year now?

A. Three or four years.

Q. Can't you fix it pretty definitely how long you have been drawing your present salary?

A. Don can find out. I can't tell exactly.

Q. Have you ever tried to get other employment —I mean before you were injured?

A. I am satisfied here.

Mr. Child: I think that is all.

Mr. Marshall: Any further questions, Mr. Abel?

Mr. Abel: I don't think so.

(The witness was excused.)

[50]

ALGOT JOHNSON,

called as a witness, being first duly sworn, testified as follows:

Direct Examination

By Mr. Marshall:

Q. Your name is Algot Johnson?

A. Yes.

Q. Do you know this claimant?

A. Yes.

Q. Have you worked with him?

A. I have worked with him for a long time.

Q. Do you remember, relatively, when Mr. Hugo was hurt in December of 1935?

A. Yes.

(Testimony of Algot Johnson.)

Q. What kind of work were you doing then, Mr. Johnson?

A. I was working in the hold as a side runner.

Q. When did your work change? When were you given any other duties than that?

A. After Mr. Hugo got hurt.

Q. Do you remember when?

A. Oh, pretty hard to tell just when it was. I think he was off for a year or more. Should have been somewhere around December or January of this year, that is December, 1936, or January, 1937.

Q. And what kind of work did you do then? [51]

A. I was assisting him in his work.

Q. In what way did you assist him?

A. Wherever he had anything—he had charge of a ship, of course, and naturally he couldn't talk to make the men understand and I had to go down in the hold and tell the men what to do; tell them whatever he told them to.

Q. Were you familiar with the operation of that company? Did the foremen on the other ships have to have assistants like yourself?

A. No, they did not have to.

Q. And I gather from what you said now the principal reason you were there in that capacity was his inability to talk and give the orders?

A. That is it.

Q. What were you paid for that service for the time you assisted Mr. Hugo?

(Testimony of Algot Johnson.)

A. I was paid by the hour.

Q. Do you have any recollection of what you earned per month?

A. No, I couldn't—if I was to say that I would just have to guess at it. I was paid $1.20 an hour.

Q. From memory, can you give an idea about what you earned, roughly, per month along about the time you first started to help on this, for several months?

A. Oh, about $135 to $150. Maybe sometimes up to $175. [52] Something like that. All depends on the ships.

Q. How long did that work continue? That is the work of your assisting Hugo, how long did that continue? Up to what date? Do you remember that?

A. I couldn't say the date, some time in the latter part of June or July.

Q. I think his testimony is he changed his work in July. Did you keep on with him up to that time, any change in work?

A. I did, yes.

Q. Did you assist him in just the same way on all of the ships or just some of them?

A. Any time I was off I was always with him. Sometimes the ships come in too many at a time and they had to put me on some other ship but he always picked up somebody on the ship to help him.

Q. What other men would help him?

A. Any of the longshoremen could help him in a pinch when I wasn't there.

(Testimony of Algot Johnson.)

Mr. Abel: Q. Could he do the work of superintending and loading a ship without assistance?

A. No, I don't think so.

Q. Why not?

A. He couldn't do it satisfactorily. He could in a way, but he couldn't do it satisfactorily to his employer.

Q. Why not? [53]

A. Because he couldn't make himself understood.

Q. Why couldn't he make himself understood?

A. Why, if you were down in the hold, he couldn't make himself understood without going down there.

Q. You mean because of his disability?

A. Yes, that is it. He has to go down in the hold. I have seen him many times go down in the hold and he would have to stop between decks, coming up the ladder.

Mr. Marshall: Q. Why do you figure he did that?

A. Because he couldn't breathe. Every time he came up he would go like that (indicating)—losing his breath.

Mr. Abel: Q. If he should lose his job with the Twin Harbors Stevedoring Company do you think he could get another job like that?

A. Not as foreman, he couldn't, unless they was willing to give him an assistant with it.

Mr. Abel: I think that is all.

Mr. Marshall: Mr. Child?

Mr. Child: Nothing.

(The witness was excused.)

Mr. Marshall: Any further testimony?

Mr. Child: I would like to put Mr. Hill on.

Mr. Hill: Your Honor, I am not authorized to speak for the stevedoring company, and I am not a competent witness in the case.

Mr. Child: You have a great deal of knowledge about this [54] man?

Mr. Hill: All I can say would be to give my personal opinion, and my opinion would be biased in three ways. I was not subpoenaed as a witness. I just came here as an observer, as part of the audience.

Mr. Child: Well, can't we subpoena him as a witness now?

Mr. Abel: Treat yourself as subpoenaed. They can get out a subpoena. Come forward.

DAN P. HILL,

called as a witness, being first duly sworn, testified as follows:

Direct Examination

By Mr. Child:

Q. What is your name?

A. Dan P. Hill.

(Testimony of Dan P. Hill.)

Q. Are you one of the owners of the Twin Harbors Stevedoring Company?

A. No.

Q. An employe?

A. I am an employe; yes, sir.

Q. How long have you been an employe?

A. Fourteen years.

Q. And Mr. Otto Hugo has been employed during that time, [55] fourteen years?

A. Yes, I think so. He was big man when I came there in 1923.

Q. What do you mean by big man?

A. He was the chief foreman.

Q. Did he get more money than the other foremen at that time?

A. Yes, sir.

Q. Has he always continued to get more money than the other foremen?

A. Yes, sir.

Q. And his pay has been increased from time to time?

A. Yes.

Q. Was his pay reduced at all during the depression?

A. I think his pay was the same, if I remember.

Q. You can't remember at any time when his pay was ever reduced from what it had been previously?

A. The only time I remember he received a decrease of pay was during the last strike, for two or three months.

(Testimony of Dan P. Hill.)

Q. Otherwise it has been a steady increase, hasn't it?

A. Yes, sir.

Q. That is because he was making good on the job, wasn't it?

A. Because he earned the money for the stevedoring company.

Q. Isn't it true that he bears the reputation of being [56] about the best man in his line in the Grays Harbor district?

A. Yes, sir.

Q. Isn't it true that he is pretty well known in other districts throughout the Northwest?

A. I doubt if any of them know him except by reputation.

Q. He is not a drinking man, is he?

A. No, sir.

Q. And hasn't he very deep and thorough knowledge of ships and loading ships? In other words, isn't it true that his value to you is more for what he has in his head than what he does with his hands or his voice?

A. No. It takes bodily activity.

Q. But he is in good bodily condition, isn't he, aside from his voice?

A. Except for his lungs.

Q. Some difficulty in breathing?

A. Can't breathe.

Q. Yet he worked as a foreman from February to July, with an assistant?

A. Yes.

(Testimony of Dan P. Hill.)

Q. You paid the assistant something like $175 a month in addition?

A. In addition.

Q. So that the work that he was formerly doing for $325 [57] cost you during those months about $500?

A. I would judge that is correct.

Q. Well, why didn't you hire the other man instead of Hugo?

A. We were always hoping for the best and—that is all.

Mr. Marshall: Q. When you say you were hoping for the best, you mean you thought his condition would improve?

A. Yes.

Mr. Child: Q. How about July 1, did you decide that his condition was not going to improve?

A. I think that was the chief reason that his work was changed.

Q. Then you made him a superintendent?

A. Yes, sir.

Q. Now he has general supervision over several ships instead of immediate supervision over one?

A. Yes.

Q. Well, is he doing good work?

A. First-rate.

Q. Are you satisfied with his work?

A. I couldn't speak for the officers of the company.

(Testimony of Dan P. Hill.)

Q. Has there ever been any discussion about letting him out?

A. I have heard no information of that kind.

Q. Is it true that he is still the best man in Grays [58] Harbor for loading ships?

A. He has the brains, but he hasn't the physique.

Q. He has the physique to be a superintendent, hasn't he?

A. Well——

Q. (Interrupting) He is holding up the work, isn't he?

A. The truth is I don't know so much of his work, so I don't know whether he is doing good work or not.

Q. You just said there hadn't been anything said about that?

A. What?

Q. You just said there has been no talk of firing him.

A. I have heard no information, sir.

Q. Have you a physique yourself that would enable you to do a foreman's work?

A. No, absolutely not.

Q. Then you are paid for brain work, aren't you?

A. I am paid for what I know.

Q. Wasn't Mr. Hugo paid for what he knows?

A. No, he hasn't been paid that way.

Q. What is that?

A. No. I would say he was not.

(Testimony of Dan P. Hill.)

Q. What are you paying him for now?

A. Well, I have no knowledge of why he is being paid.

Q. Aren't you pretty close to the managers of the company?

A. I hire nothing, no, sir. I am not consulted in any way [59] nor do I consult them.

Mr. Child: I think that is all.

Mr. Marshall: Any further questions?

Mr. Abel: Just one or two questions.

Q. Has his ability to work been substantially reduced by the injury to his larynx and vocal cords, trachea?

A. It is my opinion that there is no question that his ability to work is materially different from what it was before.

Q. Do you think you could get a job such as he had at the time of the occurrence of the injury, if he went out to get a job now, with some other employer?

A. I think there would be no chance.

Q. Because of the injury that he suffered from?

A. I am afraid so.

Mr. Abel: That is all.

Recross Examination

By Mr. Child:

Q. Do you think that his ability as a superintendent has been decreased?

A. His what?

(Testimony of Dan P. Hill.)

Q. His ability as a superintendent has been decreased?

A. Well, in my opinion when a man can't talk it is very difficult to get along in any position.

Q. Don't you think he could get a job with other employers? [60]

A. I don't know about that. The demand is very slight.

Mr. Child: That is all.

Mr. Marshall: Q. What is your position with the Twin Harbors Stevedoring Company?

A. Well, I take care of the insurance cases, and with the taxation cases—all taxes.

Q. You are employed for that purpose?

A. Yes.

Q. You have nothing to do with the employment of the employees of that company?

A. Not a thing.

Q. Or their discharge?

A. Not a thing.

Q. Have you any authority in that connection?

A. No.

(The witness was excused.)

Mr. Abel: Mr. Hugo desires to make one further statement.

OTTO HUGO,

recalled, being previously sworn, testified as follows:

Direct Examination

By Mr. Abel:

Q. What do you wish to add, Mr. Hugo, to what you have already said?

A. Well, it is just about the superintendent's job. We [61] haven't had a superintendent there for four years, since the time I got the raise of $25; we have never had any superintendent there at all until just the first of June or July when they put me in there for that kind of—to make it easy for me, that is what I think. Never had any superintendent before since Captain Lund was fired three or four years ago.

Q. Then you think you are holding your job at the present time because of the valuable services you rendered in the past, before your injury, do you?

A. That is the way it appears to me.

(The witness was excused.)

Mr. Marshall: Is that all, gentlemen? Anything further on either side?

Mr. Abel: That is all.

Mr. Child: I would like to have this hearing continued. I don't think we have got to the bottom of it.

Mr. Marshall: You want to have a further hearing some time later?

Mr. Child: Yes.

Mr. Marshall: All right.

Mr. Abel: What witnesses do you wish to get? Any particular subject that you wish to go into?

Mr. Child: Yes. I don't think it is necessary to name them now. I have got several things on my mind. [62]

Mr. Marshall: It is so ordered.

(Whereupon, at 2:30 o'clock P. M., the hearing was adjourned.)

State of Washington,
County of King—ss.

I, A. E. Kane, do hereby certify that, pursuant to and under the direction of the Deputy Compensation Commissioner, I was present and took verbatim stenographic notes of the proceedings had and testimony given at the above-entitled hearing; that the foregoing, consisting of pages 1 to 49, both inclusive, is a full, true and accurate transcript of my stenographic notes so taken as above to the best of my ability and skill.

A. E. KANE
Reporter.

[63]

United States Employees' Compensation Commission

Fourteenth Compensation District.
Case No. 27-501

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act.

OTTO HUGO,

Claimant,

against

TWIN HARBOR STEVEDORING AND TUG COMPANY,

Employer,

FIREMAN'S FUND INSURANCE COMPANY,

Insurance Carrier.

TRANSCRIPT OF TESTIMONY AT HEARING

Pursuant to notice, this matter was heard before Wm. A. Marshall, Deputy Commissioner, United States Employee's Compensation Commission, at Aberdeen, Washington, on the 12th day of November, 1937.

Appearances:

W. H. ABEL, Esq.,
appearing for the Claimant.

BOGLE, BOGLE & GATES
By W. T. BEEKS, Esq.,
appearing for Employer and Insurance Carrier. [65]

PROCEEDINGS

Mr. Marshall: You may proceed, gentlemen.

Mr. Abel: I will call Mr. Phillipi.

C. A. PHILLIPI,

was called as a witness for and on behalf of the Claimant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Abel:

Q. What is your name?

A. C. A. Phillipi.

Q. Where do you live?

A. Aberdeen.

Q. Street address?

A. 400 Myrtle.

Q. What is your occupation?

A. I am dispatcher for the Longshoremen's Union.

Q. Where?

A. In Aberdeen.

Q. How long have you held that position?

A. Well, intermittently, about a year and a half.

Q. And before that what was your occupation?

A. Longshoring.

Q. For how long?

A. Four years. [67]

Q. Do you know Otto Hugo?

A. Yes, sir.

Q. How long have you known him?

(Testimony of C. A. Phillipi.)

A. Well, for about eight or nine years—nine years.

Q. Then you knew him before he suffered a personal injury to his throat?

A. Yes, sir.

Q. What can you say as to whether his voice is affected by the said injury to his throat?

A. Well, I took orders by phone from the stevedoring companies for all the ships that came in and gave orders for crews, and——

Mr. Beeks: I do not think there is any dispute about that.

A. (Resumed) Very well. I know one particular instance where I had verified the order he had given by calling the superintendent; that is, he called me and I verified the order. He might have sent two gangs to a different mill than they were supposed to go.

Q. Has there been any serious impairment of his voice—to the use of his voice since the injury?

A. As far as I know, yes, there has.

Q. You had knowledge. Do you know whether there is or not?

A. Yes. [68]

Q. To what extent? Has the disability of his voice been reduced by the injury, that you can say?

A. Well, I couldn't say definitely; but then it has been quite a bit, because he hardly talks above a whisper. You can verify that by some of the long-

(Testimony of C. A. Phillipi.)

shoremen that work around here. You know, he had a pretty good voice previous to that. He could be heard plainly all over the ship. In fact, he was heard.

Mr. Abel: I think that is all.

Mr. Beeks: I have no questions.

(The witness was excused.)

FRANK A. HILL,

called as a witness for and on behalf of the Employer and Insurance Carrier, being first duly sworn, testified as follows:

Direct Examination

By Mr. Beeks:

Q. Will you state your full name, Mr. Hill?

A. Frank A. Hill.

Q. Where do you reside, Mr. Hill?

A. Aberdeen, Washington.

Q. How long have you resided in Aberdeen?

A. Since 1922.

Q. What is your occupation, Mr. Hill?

A. Manager of the Twin Harbor Stevedoring and Tug [69] Company.

Q. The Twin Harbor Stevedoring and Tug Company?

A. Yes.

(Testimony of Frank A. Hill.)

Q. Is that a corporation?

A. Yes, sir.

Q. A Washington corporation?

A. A Washington corporation; yes, sir.

Q. How long has that corporation been in existence?

A. June 16, 1922.

Q. Have you been connected with it since its organization?

A. Yes, sir.

Q. What relation do you bear to that corporation?

A. Vice-President and General Manager.

Q. How long have you been such?

A. Since its beginning.

Q. What is the principal business of the Twin Harbor Stevedoring and Tug Company?

A. Loading and unloading ships.

Q. As a contract stevedore?

A. Yes, sir.

Q. How long has that corporation been so engaged?

A. Since June 16, 1922.

Q. Since its origin?

A. Yes. [70]

Q. By contract stevedoring, what do you mean, specifically, Mr. Hill?

A. Contract by the unit.

Q. A certain ship's cargo at so much per ton?

A. So much per foot.

(Testimony of Frank A. Hill.)

Q. So much per thousand feet?

A. So much per unit for loading or discharging, usually.

Q. And your profit, of course, on a contract of that kind, is the difference between the contract price and what it costs to load or discharge?

A. Yes, sir.

Q. Now, your operations since the organization of your company have been quite extensive, have they not?

A. Extensive as far as Grays Harbor is concerned.

Q. How long has Otto Hugo been in the employ of the Twin Harbor Stevedoring and Tug Company?

A. Since the beginning of the company.

Q. In what capacity did he originally join the company?

A. He joined first as an ordinary longshoreman.

Q. What had his occupation been prior to his joining your company?

A. I do not know.

Q. You don't know? [71]

A. No.

Q. I understand that he is a master mariner. Did you know that?

A. I am not familiar with that; I do not know whether he is or not.

Q. Has he occupied positions, to your knowledge, as chief officer of various vessels?

(Testimony of Frank A. Hill.)

A. Not to my knowledge.

Q. Are you familiar with that?

A. Not to my knowledge.

Q. You say he originally joined your employ as a longshoreman. That was in the days, of course, when they did not hire from the hall; that is, you had your own employees?

A. We hired ourselves.

Q. You hired yourselves?

A. Yes.

Q. How long did he remain in your employ as a longshoreman?

A. A very short time. A matter of two weeks.

Q. Two weeks?

A. Two or three weeks. It was a short time.

Q. What position did he then occupy with your company?

A. As a foreman [72]

Q. A stevedore foreman?

A. A stevedore foreman.

Q. At the time he was promoted to a stevedore foreman, did you have other stevedore foremen in your employ?

A. He was the first one we engaged.

Q. Now, do you recall what his salary or wages were when he originally commenced with your company?

A. Oh, I imagine—I don't know for sure. I imagine a little better than $200 a month.

(Testimony of Frank A. Hill.)

Q. Did he work on an hourly or monthly basis?

A. No, on a monthly basis. He began on a monthly basis.

Q. Now, did you have in your employ at that time, or prior to the time that he was promoted to a stevedore foreman, a superintendent of operations?

A. Yes, sir.

Q. Who was that?

A. Captain Lund—H. C. Lund.

Q. And then when Mr. Hugo was promoted to stevedore foreman, you had a superintendent and a stevedore foreman?

A. Yes, sir.

Q. Was Mr. Hugo promoted to stevedore foreman to fill a vacancy that had theretofore existed, or a new job had been created?

A. Well, we did not have a foreman. We just started [73] it.

Q. What were his duties as stevedore foreman when he was first promoted to that position?

A. To first hire longshoremen to work a particular ship. After they were engaged, to superintend the operations of that particular ship; that is, to get the most efficient loading operations.

Q. Of course, the natural result of that was to operate more efficiently. Do you mean to obtain more profit?

A. That is right; yes, sir.

Q. Why was Mr. Hugo chosen as your stevedore foreman?

(Testimony of Frank A. Hill.)

A. We considered him the best material available at that time.

Q. In other words, you thought he was more efficient than anyone else you knew of to load and discharge ships?

A. To manage the operations which I have just recounted.

Q. Yes. In other words, as a superintendent or for supervision?

A. Yes.

Q. You felt that your company would be in position to earn more profit than with someone else not available?

A. We considered him the best available man at that time; yes, sir. [74]

Q. Was he given an increase in pay?

A. As time has gone on he has; yes, sir.

Q. When he was promoted first to stevedore foreman, what was the wage at that time of these men?

A. I think it was 80¢ an hour, which was occasional labor. He had an assured monthly income, and sometimes if they worked over-time, the foreman's pay did not vary very much from the—on a particular job, from the longshoremen on that job; but so much a month as pay was an assured factor. It would be more than the yearly pay of the longshoremen.

Q. Of course, prior to his being promoted to stevedore foreman, he had an assured monthly income, did he not?

A. I don't know as to that.

(Testimony of Frank A. Hill.)

By Mr. Marshall:

Q. Right there, now. Your testimony was that he worked as longshoreman first?

A. Yes, sir.

Q. And his earnings will vary according to the amount of work?

A. Yes, sir.

Mr. Beeks: I misunderstood his testimony.

By Mr. Beeks:

Q. I understood you to say that when he was originally employed, he was on a monthly basis. [75]

A. No.

Q. Well, then, just so I can straighten matters out here. His salary was around $200 a month when he became foreman?

A. Yes, sir.

Q. How long did he remain in your employ as a stevedore foreman?

A. Until about the middle of July of this year.

Q. Of this year?

A. Yes.

Q. Now, during the course of about fifteen years, I take it, he has been in your employ as a stevedore foreman, and you have employed other stevedore foremen?

A. Yes, sir.

Q. Do you know how many?

A. Oh, various foremen, from six to eight.

(Testimony of Frank A. Hill.)

Q. Do you mean that during all that time you have hired six or eight, or do you mean that you had in your employ at one time six or eight?

A. At one time we had—at one particular time, just for an occasional time as many as fifteen; but for a time we used, or used, for a considerable time six or eight men by the month.

Q. That would be your average during the period they were in your regular employ as stevedore foremen. [76]

A. Not as an average over the period.

Q. Not as an average?

A. No.

Q. Do you recall how long a time it was after Mr. Otto Hugo was promoted to stevedore foreman before you employed some other individual as stevedore foreman?

A. Oh, I do not think it was much more than a month.

Q. As your business has grown, I take it you have had other men?

A. Yes, as we had more ships, we had to have more.

Q. How long was Mr. Lund in your employ as a superintendent?

A. Until June 15, 1933.

Q. June 15, 1933?

A. Yes.

Q. Did you thereafter have a superintendent of operations?

A. No, sir.

(Testimony of Frank A. Hill.)

Q. Was that a retrenchment as a result of the depression?

A. Yes. Business fell off, and we didn't have the need for them that we had before, because we had old longtime experienced foremen on the jobs.

Q. Now, Mr. Hill, describe, if you can, the difference between the duties of the superintendent who, I take it, was [77] Mr. Lund, up to 1933, and the stevedore foreman?

A. Well, the stevedore foreman is the man that comes in contact with the longshoremen. He is the man that engaged the longshoremen until 1934, when the new system was established by arbitration. After the men, the most capable man was chosen for the work on the ship; then the foreman distributed them through the ship to get the most efficient organization, to see that they had safe working conditions, to see that the gear was adequate and in sufficient amount, and to oversee the general operations, to see that they were working most efficiently and the cargo stowed in accordance with the wishes of the Chief Officer, or the Master, or whoever was in charge of his ship—that is the foreman.

Q. That is a foreman on a specific ship or on a specific job?

A. The superintendent is the man that at that time designed the cargo and saw to it that it was constructed and made available for the ship. The next work was to see that the foreman was engaged, or placed, for that particular ship and have general

(Testimony of Frank A. Hill.)

supervision of the work to see that the work was carried on in a seamanlike manner and to the satisfaction of all concerned.

Q. I suppose the foreman—the superintendent, rather, took the foreman off the various vessels, if there were more than one vessel in the harbor that you were working at that [78] time?

A. That is right.

Q. But this was, of course, under your direction and supervision, too?

A. Under my general supervision.

Q. Now, suppose, Mr. Hill, during this period that there was more than one vessel in the harbor which you were either loading or discharging, how did you determine which foreman would take which ships?

A. First, by the type of work that was to be performed and, second, take into consideration that the work was distributed among the various monthly foremen that we had, so that one foreman didn't have more than his portion of the work.

Q. Well, suppose that some particular types of ships were more difficult to load or discharge and make a profit on—there are some that are more difficult to make a profit on than others, is that a fact?

A. There are some that are more difficult to work, heavier work.

Q. And did you or did you not on such a ship endeavor to choose your most efficient foreman?

(Testimony of Frank A. Hill.)

A. We tried to choose the most efficient foreman for the particular type of work that was in hand, yes.

Q. Whom did you consider during this period was your [79] most efficient foreman?

A. Mr. Hugo.

Q. And for what reason, Mr. Hill?

A. The fact that he had sound judgment of the men to get the right man, and the men liked to work with him, because he knew how to accomplish the most with the least effort.

Q. Because of his particular abilities along those lines, he was able to load and discharge a vessel at the least cost than somebody else would be?

A. It would depend. Some ships would cost more than other ships; but as a general rule, he was the most efficient.

Q. Did you ever make any study or keep any record of your per unit cost of loading and discharging as between the different foremen?

A. Oh, not very much, no, because conditions change so that you can't. There are different types of jobs and different cargo that has to be loaded.

Q. Did you ever make any study or keep any record of it as to a particular vessel with a similar cargo as between the different foremen?

A. Only in a general way.

Q. Well, what were your conclusions, or what are the results of that general study? [80]

A. As stated, that Mr. Hugo was the most efficient foreman.

(Testimony of Frank A. Hill.)

Q. Now, you have testified that in 1933 you did away with the services of the superintendent of operations. Now, thereafter, how did you operate in the loading or discharging of vessels?

A. Direct contact with the office—our office force with the foreman.

Q. I am asking you about during this period that you had a superintendent and there were two or more vessels in the harbor at one time, it would be the superintendent's duty, I take it, to supervise the loading or discharging of all of those vessels?

A. That is right.

Q. In other words, he was not passed from vessel to vessel to see how things were going on?

A. No, sir.

Q. He made suggestions, I suppose?

A. Yes, sir.

Q. Now, do you mean to say that after the superintendent was through, or went away, that you took over the direct supervision yourself?

A. With our assistance from the office.

Q. Other employees in the office?

A. Yes. [81]

Q. Now, was Mr. Lund a capable superintendent?

Mr. Abel: I object to that upon the ground that it is immaterial. It has no relation to our inquiry here.

Mr. Beeks: I think it will have.

Mr. Marshall: I do not see where it has. We usually give a rather wide latitude. I have not at-

(Testimony of Frank A. Hill.)

tempted to restrict you in any way. We want to get all the evidence, as I understand, in the hearing.

Mr. Abel: Well, if your Honor——

Mr. Marshall: (Interrupting) We do not want to go into anything that was covered in the other hearing, do we?

Mr. Abel: I think not.

Mr. Marshall: All right. Go ahead.

Mr. Beeks: Mr. Reporter, will you read the question?

(The question referred to was read by the reporter.)

A. He was for a considerable period of time.

By Mr. Beeks:

Q. Well, up to what time, Mr. Hill?

A. From 1922 until about 1927.

Q. What happened thereafter?

A. Just the general efficiency declined.

Q. Was that one of the factors that you should take [82] into consideration in doing away with his services?

A. After we became better organized, the foreman had been with us for a considerable period—during that period. and his services were no longer of any value.

Q. Now, what, just approximately—I do not know how you designate it, but did you pay your superintendent, Captain Lund, $200 a month too?

Mr. Abel: That is objected to as immaterial.

(Testimony of Frank A. Hill.)

Mr. Beeks: Oh, I think, if your Honor please, that all this is relevant, and has a bearing on the issues involved in this hearing.

Mr. Marshall: The objection will be noted. Go ahead.

A. He was getting $275 a month at the time that his services were dispensed with.

By Mr. Beeks:

Q. Do you know what his salary had been previously?

A. Well,——

Q. (Interrupting) Had it been a constant salary or had it decreased or increased?

A. It had increased slightly, probably from about $225 to $275.

Q. During this period of 15 years?

A. Yes.

Q. But it had never been decreased? [83]

A. No.

Q. Up until the time his services were terminated?

A. No.

Q. Now, what wage increases, if any, or salary increases, did Mr. Hugo receive while he was in your employ?

A. He was increased up to $325 a month.

Q. Do you have the dates of the increases that were given to him?

A. Not during all that time, no. In 1930, he was getting $300 a month.

(Testimony of Frank A. Hill.)

Q. In 1930 did you say he was getting $325 a month?

A. He was getting $325—let us see (the witness referring to some papers).

Q. How much was he getting at the time he received this injury?

A. (The witness referring to some papers) Well, —his wages, up until 1935, increased to $300 a month.

Q. And from that period on, your basic wage of $300 was maintained, was it?

A. There was a strike about that time. Some months no wages were paid at all, so that the yearly wage, when it was taken into consideration in 1936, he received $1290, a little better than $100 a month.

Q. That was what year?

A. 1936. [84]

Q. And that was the year of his injury?

A. The year following the injury, yes.

Q. Or following the injury?

A. Yes, sir.

Q. Up until the time of his injury, he had a basic wage of $300 a month?

A. $250 and $275 and $300 a month.

Q. And that was each and every month?

A. The employment was fairly steady, very steady up until the end of 1935.

Q. Now, I take it that subsequent to the first maritime strike, which was in the summer of 1934, that your method of operations changed somewhat?

(Testimony of Frank A. Hill.)

A. Well, the method changed in regard to the selection of the men.

Q. That was the only respect, was it?

A. Yes.

Q. In other words, subsequent to that time, you had to take only the men that were sent to you?

A. Yes. Since that time we took the men that were dispatched to us.

Q. Did that make any difference in the duties of your stevedore foreman?

A. It relieved him of that one piece of work, selecting the men. [85]

Q. Well, didn't it do this, too, Mr. Hill, didn't it make it more of a problem on behalf of your company to make a profit?

A. Oh, it became more difficult all the time.

Q. And that required greater supervision?

A. Yes.

Q. And more constant supervision?

A. Yes.

Q. And that meant greater supervision and more emphasis or more attention in regard to the stowage and discharge?

A. Yes.

Q. Well, during this period and immediately prior to the injury which Mr. Hugo suffered, I wish you would describe in more or less detail just exactly what his duties were; that is, from the time that you knew that you had a ship to load or discharge until that job was completed prior to 1934?

(Testimony of Frank A. Hill.)

A. Repeating what I have already given——

Q. (Interrupting) I am concerned principally with the period subsequent to the first maritime strike and prior to the injury that Mr. Hugo received.

A. He would advise the hall, or the dispatcher of the longshoremen, the number of gangs that we needed for a particular piece of work, or a particular ship, and he would then see that his gear was made available and ready for the ship at the time the ship would arrive. He had supervision [86] of tying up the ship and making the ship ready to receive cargo.

Q. Well, now, when you speak of supervision of the tying up of the ship, do you mean someone down there to take the lines under the direction of the mate or the Master from the bridge and placing the ship at its place on the dock?

A. Yes, sir.

Q. Well, now, will you just go ahead now, Mr. Hill. I am sorry I interrupted you.

A. And after the ship was made ready to receive cargo and the men were dispatched to the ship and had arrived at the ship, then he had general supervision of the men to see that the work was safely done and as rapidly and efficiently as possible.

Q. Until the loading or discharging was completed?

A. Until the loading or discharging was completed; yes, sir.

(Testimony of Frank A. Hill.)

Q. Now, during that general supervision, what manual acts would he do or would he perform?

A. He would go up and down the holds of the ship and to the deck several times.

Q. Every half day or so?

A. Until it was loaded; he would go into each hatch.

Q. Each hatch on the ship?

A. Yes, and he would watch continuously from the deck [87] of the ship the operations down below. He would call and direct the men as to their operations.

By Mr. Marshall:

Q. Right there, Mr. Hill, in going down into the hatch and the lower holds of the vessel, that would require climbing ladders?

A. Yes, sir.

By Mr. Beeks:

Q. Then he would go from various parts of the ship, and with his superior knowledge that he had gained over a period of years, he would be looking to see whether the work was being performed efficiently or not?

A. That is right.

Q. And if it was not, what would be do?

A. Correct it.

Q. Well, now, subsequent to the injury which he received—by the way, do you recall the date of that injury?

A. December 5, 1935.

(Testimony of Frank A. Hill.)

Q. Did he perform the services of a stevedore foreman——

By Mr. Marshall:

Q. (Interrupting) That should be December 2, should it not?

A. December 2, yes. Excuse me. It should be December 2, 1935.

Mr. Beeks: Mr. Reporter, will you read the question? [88]

(The question referred to was read by the reporter.)

A. Yes, sir.

Q. For what period of time?

A. Well, after he recovered sufficiently to attempt to resume work, which, as I remember it now, was about the middle of 1936, although he has been off several times since that; but from the time he first attempted to go to work intermittently, at that particular time as a foreman until July—the middle of July of this year.

Q. Now, subsequent to his injury, what part of his former duties as a stevedore foreman was he not able to perform, if any?

A. His efficiency.

Q. No, that was not my question as to his efficiency, Mr. Hill. If you will just tell us what duties he was not able to perform.

A. Well, he can't call out to his men and direct them. He has to go and point and show them the

(Testimony of Frank A. Hill.)

actual work to be done, and if he sees a dangerous practice engaged in, he cannot—well, he cannot have it stopped immediately.

Q. Because of his inability to call to the men?

A. Inability to call to his men.

Q. Well, now, during all of this period prior to his injury and during the course of longshoring or stevedoring operations, it has always been most difficult to speak and [89] be heard on a vessel, has it not?

A. Not particularly so, no.

Q. Hasn't there always been more or less noise in the operation on these vessels?

A. No, not when you are in the hold; that is, not when you are in the lower hold. When you are in a certain place, they are all watching. He would be climbing up here and telling them (the witness illustrating). He can't talk and say, for instance, "Put that block up there in a certain position." He could tell them much more quickly and much more efficiently if he could do it by telling them.

Q. Well, as a matter of fact, Mr. Hill, on some vessels, because of that noise that exists during the progress of the operations, don't they develop signals for specific things?

A. The hatch tender.

Q. For the hatch tender?

A. The hatch tender and the driver and the side runners.

(Testimony of Frank A. Hill.)

Mr. Marshall: I think that in the former testimony it was testified that the signals covered only certain lines of operations.

The Witness: The side runner must talk, and the men call out to the hatch tender. The hatch tender must call out too.

By Mr. Beeks:

Q. But there is his inability to speak loudly and make [90] himself heard, his general skill and knowledge of stevedoring is just the same as it was before, isn't that right?

A. I do not think his general knowledge has been impaired, no.

Q. Well, his knowledge was his chief asset as a stevedore foreman, was it not?

A. Coupled with other abilities. His other abilities without knowledge, would not be of any value; but his sight and his seeing and his speech were a very essential part of his knowledge.

Q. Let me ask you this: subsequent to his injury, did you continue to pay him the same wage that you had before, the same basic wage?

A. In 1936?

Q. Yes.

A. No, beginning in 1937, we have.

Q. What was the difference between the basic wage that was paid him at the time of his injury and that which he received subsequent to 1936?

(Testimony of Frank A. Hill.)

A. We had interruptions in 1936 by strikes, and also his work was impaired by not being able to work.

Q. I do not mean the total wage for the year; I mean the basic wage?

A. Well, during 1936, there wasn't any basic wage. We paid the boys in 1936, to try to get along and keep up [91] their expenses.

Q. Of course, keep the organization together so that they would not drift away, and there was a prolonged maritime strike during that period, was there not?

A. Yes, sir.

Q. How much time during the year of 1936 did Mr. Hugo put in as a stevedore foreman?

A. Well, off and on—it was not continual, because work was not too heavy and it fell off during the latter part of the year; but I would just say offhand, without looking it up in detail——

Q. Just approximately.

A. That was about half of the time.

Q. About half of the time?

A. Yes.

Q. Were the general results of his supervision as satisfactory as they had been previously?

A. No, they were not.

Q. In what respect, Mr. Hill?

A. Because he could not accomplish the work as rapidly as he accomplished it before, and it took time to go down a particular hatch and take hold

(Testimony of Frank A. Hill.)

of a particular man and direct him, while before he could call out and direct him; that is, he could call out and direct the whole group so that while he was directing the work in one particular part of the ship, [92] the rest of the ship suffered.

Q. Well, do you mean by that that instead of calling from the hatch and telling a man to do a certain thing, that he would have to go down there in person?

A. Yes.

Q. Are you able to give us anything in dollars and cents that would illustrate the impaired efficiency?

A. No, just declined efficiency. It is very difficult to measure it in dollars and cents over a period of that kind.

Q. You had, during this period, to send someone with him, didn't you, to do the manual act of speaking?

A. We found it more practical to have an experienced man and an inexperienced foreman go together; that is, a foreman that we were endeavoring to educate.

Q. Was it an inexperienced foreman that you were endeavoring to educate who accompanied Mr. Hugo?

A. Yes.

Q. Well, you did consider his services and his general knowledge sufficiently valuable to you to go to this extra expense, having someone to do the

(Testimony of Frank A. Hill.)

actual act of speaking under operating conditions?

A. Because of the meritorious work that he had performed, I did not think it incumbent upon the company to dismiss him on account of his impairment at that time.

Q. Now, when was it that he was promoted to the position [93] of superintendent?

A. He took the position of superintendent in July, about the middle of July, of this year.

Q. Of this year?

A. Yes, sir.

Q. And how did his duties as general superintendent vary from the duties that he had previously performed as stevedore foreman?

A. Well, he does not have the same contact with the longshoremen that he had before. That detail is left to the foreman on that particular work.

Q. Well, he has supervision of all your operations now, doesn't he?

A. He looks after the foremen and goes from ship to ship to see that everything is going all right and also to see if he has any suggestions to make.

Q. Does he do the same type of work that your superintendent did?

A. No, hardly, because we are organized now. The former superintendent had to organize the whole working force. We have the same foremen now that we have had since 1922. They are familiar with our operations and the way that we like to have them performed.

(Testimony of Frank A. Hill.)

Q. Mr. Hill, I wish you would describe as nearly as you can in detail just what duties; that is, just the continuous [94] duties, as the superintendent of your operations in the course of a week or so, as the case may be?

A. Well, he gives suggestions as to the improvement, if any, of the gear, and he watches the safety of the gear, and if he discovers that any of the gear is unsafe, he sees that new gear is replaced, and then he goes from ship to ship and walks over the ship to see if he has any particular suggestions to give to the foreman.

Q. For instance, when you have a number of ships in the harbor, he supervises the loading or discharging of all of them in a general way?

A. In a general way, and if he sees anything going not as it should be, or if he has any particular suggestions to make, he will tell the foreman, and make these suggestions to me.

Q. Now, the first six months of the present year have been exceedingly good months in the stevedoring business, have they not?

A. No.

Q. Subsequent to the conclusion of the strike?

A. We had very good months of this year.

Q. And they were operating prior to July, weren't they? They were good months prior to July, weren't they?

A. No, not prior to July—August and September were very good months. June and July, August

(Testimony of Frank A. Hill.)

and September, about [95] four months have been very good months.

Q. Considerably better than you had had in quite a period of time?

A. Why, when things were tied up because of the strike, we didn't have anything.

Q. Now, Mr. Hugo's knowledge and skill in the stevedoring business have been of considerable value to you as a superintendent, haven't they?

A. They have been of some value, certainly.

Q. When he took over the job as superintendent, he received an increased emolument, didn't he?

A. We gave him $25 a month extra.

Q. And that was the highest salary he had ever received while in your organization?

A. Yes.

Q. And he has been able to fill that new job very satisfactorily, hasn't he?

A. Well, I hate to go on record. If you are going to force me to go on record. I am reluctant to do that. I have gone into this question quite thoroughly with you, and I have—you have put me in an embarrassing position; you have put me on the spot. However, I will go ahead now. Mr. Hugo has been with us, and I have been reluctant to dismiss him. We haven't any need for a superintendent at this time any more than we need a lot of extra superfluous things; but his [96] ability as a foreman had diminished to the point where we had to get some-

(Testimony of Frank A. Hill.)

one else to do that work, so that we have created this other position in recognition of his long service with us.

Q. Of course, just at the present time general economic conditions are very bad, aren't they?

A. I would say so, yes.

Q. Since the downward swing of business in recent months and because of the war in the Orient, it has been very small compared to what it had been previously, isn't that right?

A. That is right.

Q. So that the principal reason for your not having any use for him is because of those conditions?

A. No, those were not the principal reasons, because during the time when we had a big business, we did not have any superintendent, and we got along just as well, or better.

Q. Right at the present time you are not doing very much business?

A. Of course, when we haven't any business, we don't need anybody.

Q. Of course not.

A. Certainly.

Mr. Beeks: I think that is all.

Mr. Abel: I think that is all. [97]

The Witness: I have to be fair in this matter, and I have presented it in as fair a manner as I knew.

(Testimony of Frank A. Hill.)

Cross Examination

By Mr. Abel:

Q. Do you think that with his vocal disability and his breathing impediment that he could get another job?

Mr. Beeks: I am objecting to that, Mr. Abel, for the reason that I do not think there has been any testimony about that in this case; that is, any breathing impediment.

Mr. Marshall: Oh, yes, there has.

Mr. Beeks: From this witness?

Mr. Marshall: Yes, sir.

By Mr. Abel:

Q. Do you think he could get another job as foreman or superintendent?

A. I would think not.

Mr. Marshall: That is about the only question I had in mind.

By Mr. Marshall:

Q. I will put a question in this way: If you did not know Mr. Hugo, but did know of his qualifications and you were also informed of his disabilities, would you, as manager of the institution, be inclined to employ him as a stevedore foreman? [98]

A. Not as a foreman.

Q. That is the work he was engaged in when he was hurt, wasn't it?

A. That is the work he was engaged in when he was hurt.

(Testimony of Frank A. Hill.)

Mr. Marshall: That is the only question. The hearing will be closed.

(Whereupon, at 2:06 o'clock, p. m., November 12, 1937, the hearing in the above-entitled matter was closed.)

State of Washington,
County of King—ss.

I, Ernest E. Getchell, do hereby certify that, pursuant to and under the direction of the Deputy Compensation Commissioner, I was present at and took verbatim shorthand notes of the proceedings had and testimony given at the above-entitled hearing; that the foregoing, consisting of pages numbered one (1) to thirty-four (34), both inclusive, is a full, true, and accurate transcript of my said shorthand notes, so taken as above, to the best of my ability and skill.

E. E. GETCHELL
Reporter. [99]

United States Employees' Compensation Commission
Fourteenth Compensation District

Case No. 27-501

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act.

OTTO HUGO,

Claimant,

against

TWIN HARBOR STEVEDORING AND TUG COMPANY,

Employer,

FIREMAN'S FUND INSURANCE COMPANY,

Insurance Carrier.

COMPENSATION ORDER
AWARD OF COMPENSATION

Such investigation in respect to the above entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law,

The Deputy Commissioner makes the following

Findings of Fact:

That on the 2d day of December, 1935, the claimant above named was in the employ of the employer above named at Aberdeen, in the State of Washington, in the Fourteenth Compensation District, established under the provisions of the Longshore-

men's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Fireman's Fund Insurance Company; that on said day claimant herein, while performing service for the employer upon the navigable waters of the United States, sustained personal injury resulting in his disability while he was employed as a stevedore foreman on board the Steamship "Yoshu Maru", said steamship being then moored to the Port Dock at Aberdeen, in the State of Washington; that while the claimant above named was so employed a pair of tongs attached to a cable became unfastened from a log and swung and struck the claimant on his neck, left shoulder and upper chest causing injury and resulting in his disability; that notice of injury was given within thirty days after the date of such injury to the Deputy Commissioner and to the employer; that the employer furnished claimant with medical treatment, etc., in accordance with section 7(a) of the said Act; that the average annual earnings of the claimant herein at the time of his injury amounted to the sum of $3,900.00; that as the result of the injury claimant was wholly disabled from December 2, 1935, to and including January 31, 1937, and he is entitled to 61 weeks' compensation, $25.00 per week for such disability; that at the time of his injury claimant was engaged at a monthly salary of $325.00 as a stevedore foreman whose duties were to supervise the work of longshoremen in loading cargo into [101] vessels; that as the result of his

injury claimant sustained a partial loss of his voice so that now he can whisper only, and he also suffers from shortness of breath upon exertion; that these disabilities seriously impair the claimant's efficiency as a foreman of longshoremen in loading cargo on vessels in that because of the noise caused by the operation of winches on said vessels the claimant is unable efficiently to orally direct the longshoremen in their work; that to also properly discharge his duties it is necessary for such a foreman to go to various parts of the vessel into which cargo is being loaded, this necessitating climbing up and down ladders leading to the various decks of a vessel; that because of these impairments the employer above named found it necessary subsequent to January 31, 1937 to employ another employee to assist the claimant in the discharge of the claimant's duties as a foreman supervising the loading of cargo on vessels; the earnings of the said employee assisting the claimant in the said duties averaging $150.00 per month; that during the month of July, 1937, the employer above named found it necessary to transfer the claimant to other duties because the disability of the claimant resulting from the said injury had so lessened the claimant's ability as a foreman as to make such a transfer necessary; that the wage-earning capacity of the claimant in the open labor market has been decreased from $75.00 per week to $34.62 per week, and the claimant is therefore, entitled to receive as compensation two-thirds of the difference between $75.00 per week and $34.62 per

week or ⅔ of $40.38, being limited, however, to the maximum payable under the Act of $25.00 per week; that the claimant is, therefore, also entitled to receive 40 weeks' compensation at $25.00 per week covering the period from February 1, 1937, to and including November 7, 1937; that the disability of the claimant continued at the time of the hearing on November 12, 1937; that W. H. Abel, attorney, has rendered legal services to claimant of the reasonable value of $70.00 and he is entitled to a lien on compensation due claimant therefor; that the employer has paid $2125.00 to the claimant as compensation.

Upon the foregoing facts the Deputy Commissioner makes the following

Award

That the employer, Twin Harbor Stevedoring and Tug Company, and the insurance carrier, Fireman's Fund Insurance Company, shall pay to the claimant compensation as follows: 101 weeks' compensation at $25.00 per week covering the period from December 2, 1935, to and including November 7, 1937, and amounting to the sum of $2525.00, less $70.00 to be deducted therefrom and paid W. H. Abel, as his attorney; that the employer shall have credit on this award for $2125.00 previously paid to the claimant as compensation; that subsequent to November 7, 1937, the employer and insurance carrier shall pay to the claimant compensation bi-weekly at the rate

of $25.00 per week during [102] the continuance of the claimant's disability.

Given under my hand at Seattle, Washington this 22d day of November, 1937.

WM. A. MARSHALL
Deputy Commissioner
Fourteenth Compensation District.

Proof of Service

I hereby certify that a copy of the foregoing compensation order was sent by registered mail to the claimant, the employer and the insurance carrier, at the last known address of each as follows:

Mr. Otto Hugo,
2717 Cherry Street, Hoquiam, Wash.
Mr. W. H. Abel,
Aberdeen, Wash.
Twin Harbor Stevedoring & Tug Co.,
Hoquiam, Wash.
Fireman's Fund Ins. Co.,
c/o Bogle, Bogle & Gates,
Central Bldg., Seattle, Wn.

WM. A. MARSHALL
Deputy Commissioner.

Mailed November 22d, 1937.

[Endorsed]: Filed Feb. 21, 1938. [103]

[Title of District Court and Cause.]

MEMORANDUM RULING UPON MOTION TO DISMISS BILL OF COMPLAINT

Bogle, Bogle & Gates, 603 Central Bldg., Seattle, Wash., Solicitors for Complainants,

J. Charles Dennis, U. S. Attorney, Tacoma, Wash., and Oliver Malm, Asst. U. S. Attorney, Tacoma, Wash., Attorneys for defendant Wm. A. Marshall, Deputy Commissioner,

W. H. Abel, Montesano, Washington, Attorney for defendant Otto Hugo.

This suit is one brought by an employer and its insurance carrier pursuant to Sec. 21(b) of the Longshoremen's and Harbor Workers' Compensation Act, c. 509, §21, 44 Stat. 1436 (Title 33 U. S. C. A., §921(b)) to set aside the compensation order made November 22nd, 1937 by the Deputy Commissioner.

The defendant Deputy Commissioner has moved to dismiss the Bill of Complaint, the second ground of such motion being: [104]

* * * * * * *

"Upon the further ground that the complainants' bill herein, taken together with the certified record of said Wm. A. Marshall, as Deputy Commissioner of the U. S. Employees' Compensation Commission, affirmatively establishes that there was competent evidence to support the findings and award of said Wm. A. Marshall as

such Deputy Commissioner, which is sought to be enjoined herein."

The Complainants and defendant Deputy Commissioner have stipulated that the transcript of testimony taken before that officer and his compensation order and award be considered by the Court upon the motion to dismiss. The findings of fact and award are as follows:

"The Deputy Commissioner makes the following

Findings of Fact:

That on the 2d day of December, 1935, the claimant above named was in the employ of the employer above named at Aberdeen, in the State of Washington, in the Fourteenth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Fireman's Fund Insurance Company; that on said day claimant herein, while performing service for the employer upon the navigable waters of the United States, sustained personal injury resulting in his disability while he was employed as a stevedore foreman on board the Steamship "Yoshu Maru", said steamship being then moored to the Port Dock at Aberdeen, in the State of Washington; that while the claimant above named was so employed a pair of tongs attached to a cable be-

came unfastened from a log and swung and struck the claimant on his neck, left shoulder and upper chest causing injury and resulting in his disability; that notice of injury was given within thirty days after the date of such injury to the Deputy Commissioner and to the employer; that the employer furnished claimant with medical treatment, etc., in accordance with section 7(a) of the said Act; that the average annual earnings of the claimant herein at the time of his injury amounted to the sum of $3,900.00; that as the result of the injury claimant was wholly disabled from December 2, 1935, to and including January 31, 1937, and he is entitled to 61 weeks' compensation, $25.00 per week for such disability; that at the time of his injury claimant was engaged at a monthly salary of $325.00 as a stevedore foreman whose duties were to supervise the work of longshoremen in loading cargo into vessels; that as the result of his injury claimant sustained a partial loss of his voice so that now he can whisper only, and he also suffers from shortness of breath upon exertion; that these disabilities seriously impair the claimant's efficiency as a foreman of longshoremen in loading cargo on vessels in that because of the noise caused by the operation of winches on said vessels the claimant is unable efficiently to orally direct the longshoremen in their work; that [105] to also

properly discharge his duties it is necessary for such a foreman to go to various parts of the vessel into which cargo is being loaded, this necessitating climbing up and down ladders leading to the various decks of a vessel; that because of these impairments the employer above named found it necessary subsequent to January 31, 1937 to employ another employee to assist the claimant in the discharge of the claimant's duties as a foreman supervising the loading of cargo on vessels; the earnings of the said employee assisting the claimant in the said duties averaging $150.00 per month; that during the month of July, 1937, the employer above named found it necessary to transfer the claimant to other duties because the disability of the claimant resulting from the said injury had so lessened the claimant's ability as a foreman as to make such a transfer necessary; that the wage-earning capacity of the claimant in the open labor market has been decreased from $75.00 per week to $34.62 per week, and the claimant is, therefore, entitled to receive as compensation two-thirds of the difference between $75.00 per week and $34.62 per week or ⅔ of $40.38, being limited, however, to the maximum payable under the Act of $25.00 per week; that the claimant is, therefore, also entitled to receive 40 weeks' compensation at $25.00 per week covering the period from February 1, 1937, to and including November 7,

1937; that the disability of the claimant continued at the time of the hearing on November 12, 1937; that W. H. Abel, attorney, has rendered legal services to claimant of the reasonable value of $70.00 and he is entitled to a lien on compensation due claimant therefor; that the employer has paid $2125.00 to the claimant as compensation.

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That the employer, Twin Harbor Stevedoring and Tug Company, and the insurance carrier, Fireman's Fund Insurance Company, shall pay to the claimant compensation as follows: 101 weeks' compensation at $25.00 per week covering the period from December 2, 1935, to and including November 7, 1937, and amounting to the sum of $2525.00, less $70.00 to be deducted therefrom and paid W. H. Abel, as his attorney; that the employer shall have credit on this award for $2125.00 previously paid to the claimant as compensation; that subsequent to November 7, 1937, the employer and insurance carrier shall pay to the claimant compensation bi-weekly at the rate of $25.00 per week during the continuance of the claimant's disability."

Complainants cite: Title 33, U. S. C. A., Sec. 908(c) (21); Spratt v. Crowell, et al., 4 Fed. Supp. 368.

Defendant, Wm. A. Marshall, Deputy Commissioner, cites: Baltimore & Philadelphia Steamboat Co. v. Norton, 284 U. S. 408; Voehl vs. Indemnity Insurance Company, 288 U. S. 162; Del Vecchio v. Bowers, 296 U. S. 280; Continental Casualty Co. v. Lawson 2 Fed.(2d) 459; Northwestern Stevedoring Co. vs. Marshall, 41 Fed.(2d) 28, 30. Independent Pier Co. vs. Norton, 54 Fed.(2d) 734; Lumber Mutual Casualty Ins. Co. of N. Y. vs. Locke, 60 Fed.(2d) 35; Pacific Employers Insurance Co. v. Pillsbury (C. C. A. 9th) 61 Fed.(2d) 101; Candado Stevedoring Corp. vs. Locke (C. C. A. 2d) 63 Fed.(2d) 802; Hartford Accident & Indemnity Co. v. Hoge, 85 Fed.(2d) 420; O'Reilly's Case, 164 N. E. 440; Schneiders Workman's Comp. Law, Vol. 2, 2nd Edition, p. 1441; Roller v. Warren, 129 Atl. 158; Postal Telegraph Cable Co. vs. Industrial Accident Commission of California, 3 Pac.(2d) 6; Longshoremen's and Harbor Workers' Act, Title 33, Sections 900, 908(c), 913, 920, etc.; Spratt vs. Crowell, et al (D. C. Ala.), 4 Fed. Supp. 368.

Cushman, District Judge:

Title 33, U. S. C. A., §908(c) (21) provides:

* * * * * * *

"(c) Permanent partial disability: In case of disability partial in character but permanent in quality, the compensation shall be 66⅔ per centum of the average weekly wages, which shall be in addition to compensation for tempo-

rary total disability paid in accordance with subdivisions (b) of this section, and shall be paid to the employee as follows:

* * * * * * *

(21) Other cases: In all other cases in this class of disability, the compensation shall be 66⅔ per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the deputy commissioner on his own motion or upon application of any party in interest."

* * * * * * *

The evidence shows that defendant-claimant, at the time of the making of the award and prior thereto, received, as supervisor of stevedores, from the complainant employer $325.00 per month— [106] an amount equal to that being received by him at the time of his injury. Complainants contend that the "wage-earning capacity" of defendant-complainant, within the meaning of the above section, was, by the foregoing shown.

Notwithstanding such fact, there was competent evidence upon the hearing before the Deputy Commissioner to support the compensation order made, a resume of which evidence will not be undertaken, as well as evidence which took greatly from the weight which, under other circumstances, would no doubt be given the circumstance of the amount of

his remuneration after returning to complainant's employ. Crowell v. Benson, 285 U. S. 32-46; Northwestern Stevedoring Co. et al v. Marshall, Deputy Commissioner, 41 Fed.(2d) 28-29.

The motion to dismiss will be granted.

Any order, findings, conclusions or decree based upon the foregoing will be settled upon notice.

The Clerk is directed to notify the Deputy Commissioner and the attorneys for the parties of the filing of the foregoing ruling, including the attorney for claimant.

[Endorsed]: Filed May 18, 1938. [107]

[Title of District Court and Cause.]

DECREE OF DISMISSAL

The within cause having been submitted upon briefs, upon defendant William A. Marshall's Deputy Commissioner U. S. Employees Compensation Commission, motion to dismiss the bill of complaint, It Is Decreed that the action be dismissed and that defendants severally recover herein their costs to be taxed.

Done in Open Court this 25th day of June, 1938.

EDWARD E. CUSHMAN
United States District Judge

Approved:

OLIVER MALM
Atty. for Wm. A. Marshall

June 20, 1938.

[Endorsed]: Filed June 25, 1938. [108]

[Title of District Court and Cause.]

ORDER VACATING DECREE OF DISMISSAL

Whereas on the 29th day of June, 1938, a decree of dismissal was entered by this court in the above entitled and numbered cause, and whereas it appears that the solicitors for complainants had no notice of the entry of said decree of dismissal, and whereas one of the solicitors of the complainants has orally moved the court for an order vacating and setting aside said decree of dismissal, and whereas one of the solicitors for the defendant, Wm. A. Marshall, has consented to the vacation of said decree of dismissal; it is, now, therefore,

Ordered, Adjudged and Decreed That said decree of dismissal entered in the above entitled and numbered cause on the 29th day of June, 1938, be, and the same is hereby, vacated and set aside.

Done in Open Court this 12th day of July, 1938.

EDWARD E. CUSHMAN
Judge.

Approved for entry and notice of presentation expressly waived:

BOGLE, BOGLE & GATES
Solicitors for Complainant.,
J. CHARLES DENNIS
OLIVER MALM
Solicitors for Defendant,
William A. Marshall

[Endorsed]: Filed July 12, 1938. [109]

In the District Court of the United States, for the Western District of Washington, Southern Division.

In Equity No. 615

TWIN HARBOR STEVEDORING & TUG COMPANY, a corporation, and FIREMAN'S FUND INSURANCE COMPANY, a corporation,

Complainants,

vs.

WM. A. MARSHALL, Deputy Commissioner, Fourteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and OTTO HUGO,

Defendants.

DECREE OF DISMISSAL

The above entitled and numbered cause having heretofore come on for argument upon the defendant, William A. Marshall's, motion to dismiss the complainants' bill of complaint herein, and the court having heard the argument of counsel and the cause having been submitted upon briefs, and the court having heretofore made and filed its memorandum ruling upon said defendant, William A. Marshall's, motion to dismiss the bill of complaint herein, now, therefore, pursuant to said memorandum ruling upon said motion to dismiss, it is hereby

Ordered, Adjudged and Decreed That the defendant, William A. Marshall's motion to dismiss the

complainants' bill of complaint herein be, and the same is hereby, granted and that said action be, and the same is hereby, dismissed, and that the defendant, William A. Marshall, have and recover his costs herein to be taxed.

Done in Open Court this 12th day of July, 1938.

EDWARD E. CUSHMAN
Judge. [110]

Complainants, and each of them, except to the foregoing order granting the defendant, William A. Marshall's, motion to dismiss the complainants' bill of complaint herein and except to the dismissal of said cause, which exceptions are hereby allowed.

Done in Open Court this 12th day of July, 1938.

EDWARD E. CUSHMAN
Judge.

Approved for entry, and notice of presentation expressly waived:

J. CHARLES DENNIS
OLIVER MALM
Solicitor for defendant
William A. Marshall

[Endorsed]: Filed July 12, 1938. [111]

[Title of District Court and Cause.]

RECORD OF PROCEEDINGS:

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 5th day of July, 1938, the Honorable Edward E. Cushman, United States District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court as follows:

ORDER EXTENDING TERM:

It is by the Court Ordered that the February 1938 Term of this Court be and hereby is extended to and including October 10, 1938, in all cases where an appealable order has been made since May 31, 1938.

[112]

[Title of District Court and Cause.]

PETITION FOR APPEAL

To: The Honorable Edward E. Cushman, District Judge:

The above named complainants, feeling aggrieved by the order dismissing the above-entitled action and complainants' bill of complaint herein made and entered on July 12, 1938, do hereby appeal from the said order and decree and each and every part thereof to the United States Circuit Court

of Appeals for the Ninth Circuit for the reasons set forth in the assignment of errors filed herewith, and they pray that their appeal be allowed and that citation be issued as provided by law and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit under the rules of such court in such cases made and provided.

And your petitioners further pray that the proper order relating to the security to be required of them, be made.

TWIN HARBOR STEVEDORING & TUG COMPANY, a corporation,
FIREMAN'S FUND INSURANCE COMPANY, a corporation,
By BOGLE, BOGLE & GATES
STANLEY B. LONG
Their Solicitors. [113]

ORDER ALLOWING APPEAL AND FIXING BOND

Appeal allowed upon giving cost bond in the penal sum of $500.00.

Done this 14th day of August, 1938.

EDWARD E. CUSHMAN
District Judge.

Copy received and notice of presentation waived this 9th day of August, 1938.

J. CHARLES DENNIS
United States District
Attorney.
OLIVER MALM
Assistant United States District Attorney.
Solicitors for Defendant
Wm. A. Marshall.
W. H. ABEL
Solicitor for Defendant
Otto Hugo.

[Endorsed]: Filed August 11, 1938. [114]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Come now the complainants in the above entitled cause and file the following assignment of errors upon which they are relying in the prosecution of their appeal from the order made and entered by this Honorable Court on July 12, 1938, dismissing complainants' bill of complaint herein and dismissing the above-entitled and numbered cause:

1. That the United States District Court for the Western District of Washington, Southern Division, erred in failing and refusing to overrule and deny the motion to dismiss of the defendant William A. Marshall in that it appears from the complainant's complaint herein that the relief therein

prayed for should be granted by the Court as a matter of law.

2. That the United States District Court for the Western District of Washington, Southern Division, erred in granting the motion to dismiss of the defendant Wm. A. Marshall and in dismissing the complainant's bill of complaint herein and said action.

3. That the United States District Court for the Western District of Washington, Southern Division, erred in granting the motion [115] to dismiss of said defendant Wm. A. Marshall and erred in concluding that the complainants' bill of complaint herein failed to state facts sufficient in equity or law to entitled complainant to the relief prayed for.

Wherefore, complainant prays that said order and decree be reversed and that said United States District Court for the Western District of Washington, Southern Division be directed to reverse and set aside said order and decree and enter an order and decree as prayed for, or to make and enter an order overruling and denying said motion to dismiss and requiring the defendant Wm. A. Marshall to answer complainants' bill of complaint herein.

BOGLE, BOGLE & GATES
STANLEY B. LONG
Solicitors for Complainants

Copy received Aug. 9, 1938.
W. H. ABEL

Copy received Aug. 9, 1938.
OLIVER MALM
Asst. U. S. Attorney

[Endorsed]: Filed Aug. 11, 1938. [116]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: William A. Marshall, Deputy Commissioner, Fourteenth Compensation District under the Longshoremen's and Harbor Workers Compensation Act, Defendant, and J. Charles Dennis, United States District Attorney, and Oliver Malm, Assistant United States District Attorney, his Solicitors; and

To: Otto Hugo, Defendant, and W. H. Abel, his solicitor:

Notice is hereby given that the complainants, Twin Harbor Stevedoring & Tug Company, a corporation, and Fireman's Fund Insurance Company, a corporation, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order and decree of dismissal dismissing said action and complainants' bill of complaint herein, which said order and decree was entered herein on July 12, 1938.

TWIN HARBOR STEVEDORING & TUG COMPANY, a corporation,
FIREMAN'S FUND INSURANCE COMPANY, a corporation
By BOGLE, BOGLE & GATES
STANLEY B. LONG
Their Solicitors

Copy received Aug. 9, 1938.
W. H. ABEL

Received a copy of the within notice this 9 day of Aug., 1938.
OLIVER MALM

[Endorsed]: Filed Aug. 22, 1938. [117]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents:

That we, Twin Harbor Stevedoring & Tug Company, a corporation, and Fireman's Fund Insurance Company, a corporation, as principals, and St. Paul-Mercury & Indemnity Co., a corporation, duly organized to transact a surety business in the State of Washington, as surety, are held and firmly bound unto Wm. A. Marshall, Deputy Commissioner, Fourteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act and Otto Hugo, defendants in the above entitled cause, in the full sum of $500.00, lawful money of the United States to be paid to them and their respective heirs, executors, administrators and successors, to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and each of our successors and assigns by these presents.

Sealed with our seals and dated this 8th day of August, 1938.

Whereas, the above named principals have prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth [118] Circuit to reverse the order and decree of the District Court of the United States for the Western District of Washington, Southern Division, in the above entitled cause made and entered on July 12, 1938, dismissing said action and complainants' bill of complaint herein.

Now, therefore, the condition of this obligation is such that if the above named principals shall prosecute their said appeal to effect and if they fail to make their plea good shall answer all costs, then this obligation shall be void, otherwise to remain in full force and effect.

TWIN HARBOR STEVEDORING & TUG COMPANY, a corporation,
FIREMAN'S FUND INSURANCE COMPANY, a corporation,

By BOGLE, BOGLE & GATES
STANLEY B. LONG
Their Solicitors
Principals

ST. PAUL-MERCURY & INDEMNITY CO., a corporation,

By CASSIUS E. GATES
Its Attorney in Fact
Surety

[119]

State of Washington,
County of King—ss.

On this 8th day of August, 1938, before me personally appeared Stanley B. Long, to me known to be one of the Solicitors for and on behalf of said corporations that executed the within and foregoing instrument as principals, and acknowledged the said instrument to be the free and voluntary act and deed of said corporations for the uses and

purposes therein mentioned, and on oath stated that he was authorized to execute said instrument.

In witness whereof, I have hereunto set my hand and affixed my *official the* day and year first above written.

[Seal] W. T. BEEKS
Notary Public in and for the State of Washington, residing at Seattle.

State of Washington,
County of King—ss.

On this 8th day of August, 1938, before me personally appeared Cassius E. Gates, to me known to be the attorney in fact of the corporation that executed the within and foregoing instrument as surety, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument, and that the seal affixed thereto is the corporate seal of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal] W. T. BEEKS
Notary Public in and for the State of Washington, residing at Seattle. [120]

The foregoing bond and the sufficiency of the surety thereon is approved as a cost bond this 14th day of August, 1938.

EDWARD E. CUSHMAN
District Judge

Copy received and approval consented to this 9th day of August, 1938.

J. CHARLES DENNIS
United States District Attorney
OLIVER MALM
Assistant United States
District Attorney
Solicitors for Defendant
Wm. A. Marshall

.....

Solicitor for Defendant Otto Hugo

Copy received Aug. 9, 1938.
W. H. ABEL

[Endorsed]: Filed Aug. 22, 1938. [121]

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL

To the Clerk of the above entitled Court:

You will please prepare the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause to consist of all necessary papers and certificates, including the following:

1. Bill of Complaint and the Exhibit attached thereto and made a part thereof;
2. Subpoena in Equity and attached return;
3. Motion of Defendant William A. Marshall for Order of Dismissal;
4. Stipulation dated February 21, 1938, stipulating that the transcript of testimony there-

in referred to and the original compensation order and award of compensation made by Wm. A. Marshall, as Deputy Commissioner, on November 22, 1937, at Seattle, Washington, be considered as part of the complainants' bill of complaint herein;

5. Transcript of the testimony taken before Wm. A. Marshall, Deputy Commissioner, on November 19, 1937, at Aberdeen, Washington;
6. Transcript of the testimony taken before Wm. A. Marshall, Deputy Commissioner, on November 12, 1937, at Aberdeen, Washington;
7. Original Compensation Order and Award of Compensation made by Wm. A. Marshall, as Deputy Commissioner, on [122] November 22, 1937, at Seattle, Washington;
8. Memorandum Ruling upon Motion to Dismiss Bill of Complaint, filed May 18, 1938;
9. Decree of Dismissal dated June 25, 1938;
10. Order Vacating Decree of Dismissal dated July 12, 1938;
11. Decree of Dismissal dated July 12, 1938;
12. Minute Entry of June ....., 1938, extending term thirty days;
13. Petition for Appeal and Order thereon, Assignment of Errors, Notice of Appeal, Citation on Appeal, Cost Bond on Appeal, this Praecipe, and the Clerk's Certificate.

You are requested to transmit such record to the Clerk of said United States Circuit Court of Appeals for the Ninth Circuit in the manner provided by law.

BOGLE, BOGLE & GATES
STANLEY B. LONG
Solicitors for Complainants.

.....

United States District Attorney.

.....

Assistant United States District Attorney.
Solicitors for Defendant,
Wm. A. Marshall.

.....

Solicitor for Defendant
Otto Hugo.

Copy received Aug. 9, 1938.
W. H. ABEL.

Copy received Aug. 9, 1938.
OLIVER MALM
Asst. U. S. Attorney.

[Endorsed]: Filed August 22, 1938. [123]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO THE TRANSCRIPT OF RECORD

United States of America,
Western District of Washington—ss.

I, Elmer Dover, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the within typewritten transcript of record consisting of pages numbered from 1 to 123 inclusive, are a full, true and correct copy of so much of the record, papers and proceedings in the case of Twin Harbor Stevedoring & Tug Company, a corporation and Fireman's Fund Insurance Company, a corporation, complainant and appellant vs. Wm. A. Marshall, Deputy Commissioner, Fourteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and Otto Hugo, Defendants and Appellees, cause No. 615-E, in said District Court, as required by praecipe of Counsel filed and of record in my office in said District at Tacoma, and that the same constitutes the record on appeal from the judgment of said United States District Court for the Western District of Washington, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify, that attached to this transcript is the original citation in this cause.

I further certify that the following is a full, true and correct statement of all expenses, fees and

charges incurred on behalf of the appellants herein for making of the appeal record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Clerk's fees (Act Feb. 11, 1925) for making record 353 folios @ 5¢ per folio	$17.65
Appeal fee	5.00
Certificate	.50
Total	$23.15

I further certify that the amount of $23.15 has been paid to me by Bogle, Bogle and Gates Attorneys for the appellants.

In Witness Whereof, I have hereunto affixed the seal of the said Court, at Tacoma, Washington, this 14th day of September, 1938.

[Seal] ELMER DOVER,
Clerk,
By E. W. PETTIT
Deputy. [124]

[Title of District Court and Cause.]

CITATION ON APPEAL

To: Wm. A. Marshall, Deputy Commissioner Fourteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act and Otto Hugo, Defendants, Greeting:

You, and Each of You, Are Hereby Cited and Admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit in the City of San Francisco, State of California, within thirty days from and after the day this citation bears date pursuant to an order this day made allowing an appeal from an order and decree of dismissal dismissing said action and complainants' bill of complaint herein, which said order and decree was entered herein on July 12, 1938, in that certain suit being in equity, No. 615, wherein Twin Harbor Stevedoring & Tug Company, a corporation, and Fireman's Fund Insurance Company, a corporation, are complainants and appellants, and Wm. A. Marshall, Deputy Commissioner Fourteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and Otto Hugo are defendants and appellees, to show cause, if any there be, why the order and decree rendered [125] against the said complainants and appellants as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

Witness the Honorable Edward E. Cushman, United States District Judge for the Western District of Washington, this 14th day of August, 1938.

EDWARD E. CUSHMAN
District Judge.

Copy received this 9th day of August, 1938:

J. CHARLES DENNIS
United States District Attorney.
OLIVER MALM
Assistant United States District Attorney.
Solicitors for Defendant Wm. A. Marshall.
W. H. ABEL
Solicitor for Otto Hugo, Defendant.

Received a copy of the within citation this 9 day of Aug., 1938.

OLIVER MALM
Asst. U. S. Atty.

[Endorsed]: Filed Aug. 22, 1938. [126]

[Endorsed]: No. 8976. United States Circuit Court of Appeals for the Ninth Circuit. Twin Harbor Stevedoring & Tug Company, a Corporation, and Fireman's Fund Insurance Company, a Corporation, Appellants, vs. Wm. A. Marshall, Deputy Commissioner Fourteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act and Otto Hugo, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

Filed September 15, 1938.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 8976

United States Circuit Court of Appeals

For the Ninth Circuit

TWIN HARBOR STEVEDORING & TUG COMPANY, a corporation, and FIREMAN'S FUND INSURANCE COMPANY, a corporation, *Appellants,*

vs.

WM. A. MARSHALL, Deputy Commissioner Fourteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and OTTO HUGO, Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF OF APPELLANTS

LAWRENCE BOGLE,
CASSIUS E. GATES,
EDWARD G. DOBRIN,
Solicitors for Appellants.

303 Central Building,
Seattle, Washington.

Farwest Lithograph & Printing Co., Seattle

No. 8976

United States Circuit Court of Appeals

For the Ninth Circuit

TWIN HARBOR STEVEDORING & TUG COMPANY, a corporation, and FIREMAN'S FUND INSURANCE COMPANY, a corporation, *Appellants,*

vs.

WM. A. MARSHALL, Deputy Commissioner Fourteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and OTTO HUGO, Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF OF APPELLANTS

LAWRENCE BOGLE,
CASSIUS E. GATES,
EDWARD G. DOBRIN,
Solicitors for Appellants.

603 Central Building,
Seattle, Washington.

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RULES

No. 8976

United States Circuit Court of Appeals

For the Ninth Circuit

TWIN HARBOR STEVEDORING & TUG COMPANY, a corporation, and FIREMAN'S FUND INSURANCE COMPANY, a corporation, *Appellants,*

vs.

WM. A. MARSHALL, Deputy Commissioner Fourteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and OTTO HUGO, Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF OF APPELLANTS

STATEMENT

This is an action in equity wherein appellants, employer and carrier, respectively, under the Longshoremen's and Harbor Workers' Compensation Act (Title 33 U. S. C., 901, *et seq.*) seek to enjoin the appellee, Wm. A. Marshall, deputy commissioner under said Act, from enforcing his award of November 22, 1937 (Tr. 10, 98) in

favor of appellee Otto Hugo, and to have the same set aside as being contrary to law.

This is an appeal from the final decree of the district court dismissing appellants' bill of complaint (Tr. 112) entered upon the appellee deputy commissioner's motion to dismiss (Tr. 17).

JURISDICTION

DISTRICT COURT.

The jurisdiction of the district court is believed to be sustained by §21(b) of the Longshoremen's and Harbor Workers' Compensation Act, Title 33 U. S. C. §921(b).

CIRCUIT COURT OF APPEALS.

1. The jurisdiction of this court is believed to be sustained by §128(a) of the Judicial Code, Title 28 U. S. C. §225(a).

2. The decree appealed from was entered on July 12, 1938 (Tr. 112); within three months thereafter, pursuant to Title 28 U. S. C., §230, petition for appeal was served, filed and allowed (Tr. 114), assignment of errors was served and filed pursuant to Title 28 U. S. C., §862 and Rule 11 of this court (Tr. 116), cost bond on appeal was served and filed and approved pursuant to Title 28 U. S. C., §869 and Rule 13 of this court (Tr. 119); citation on appeal (Tr. 127) was issued and together with notice of appeal (Tr. 118) was served and filed pursuant to Title 28 U. S. C., §§861(a), (b), 867 and Rule 11 of this court, and praecipe for transcript of

record on appeal (Tr. 122) was filed pursuant to Equity Rule 75.

STATEMENT OF THE CASE

The bill of complaint (Tr. 2) incorporates therein by reference the record of all proceedings before the appellee deputy commissioner (Tr. 5) which were in addition incorporated by stipulation (Tr. 18). It appears from the bill of complaint and said records that appellee Hugo was, on December 2, 1935, in the employ of the appellant Twin Harbor Stevedoring & Tug Company (appellant Fireman's Fund Insurance Company, insurance carrier), as a stevedore foreman (Tr. 2, 3) on board the S. S. YOSHU MARU, then moored at the port dock at Aberdeen, Washington, and while so employed sustained an injury by being struck on his neck, left shoulder and upper chest by a pair of tongs (Tr. 11), resulting in a partial loss of his voice and shortness of breath upon exertion (Tr. 12); that appellee Hugo is 46 years of age (Tr. 31) and commenced to work as a longshoreman at the age of 15 years, thereafter working as a mate on sailing vessels and steamers for seven years (Tr. 31, 32), following which he went to work for the appellant Stevedoring Company in 1922 when it started in business (Tr. 31, 32, 70), first working as a longshoreman for two or three weeks, then being promoted to stevedore foreman (Tr. 72) and being known as chief foreman (Tr. 58); that his salary as stevedore foreman commenced at $175.00 a month (Tr. 32) and due to his ability gradually increased until at the time of his injury his salary

was $300.00 a month (Tr. 83); that as stevedore foreman his duties were supervising longshore work on a particular vessel (Tr. 33, 73, 77, 78) and he was considered the most efficient of the several foremen employed (Tr. 59, 79); that following his injury he returned to his former duties on February 1, 1937, at first working with an assistant because of difficulties resulting from his injury (Tr. 24, 25) and in July, 1937, he was promoted to general superintendent (Tr. 92) and his salary was increased to $325.00 a month (Tr. 94), which position and salary he continues to enjoy (Tr. 26); that as general superintendent he has taken the position made vacant by the discharge of his predecessor in June, 1933, because of inefficiency (Tr. 76, 81), who was receiving a salary at that time of $275.00 a month, the appellee Hugo then receiving as stevedore foreman a salary of $300.00 a month (Tr. 82); that due to retrenchment no general superintendent had been employed thereafter until the appellee Hugo was promoted to that position (Tr. 77); that as general superintendent the duties of appellee Hugo are a general supervision over all work on the vessels and giving suggestions to foremen as to the work on particular vessels (Tr. 93).

Despite the fact that the appellee Hugo was, subsequent to his injury, promoted to a position of greater responsibility and at an increased salary, the appellee deputy commissioner, in the compensation order and award under review (Tr. 98) has found that his wage earning capacity in the open labor market has been decreased from $75.00 a week to $34.62 a week and has

awarded him the maximum of $25.00 per week provided by the Act from the date of injury and during the further continuance of his alleged disability (Tr. 100, 101).

The motion of the appellee deputy commissioner for an order of dismissal on the ground of insufficiency of facts (Tr. 17) was granted and the bill of complaint dismissed (Tr. 112), the district court in its memorandum stating that there was competent evidence before the appellee deputy commissioner to support the compensation order and award (Tr. 109).

The question involved on this appeal is whether the appellee Hugo has suffered a disability under the provisions of the Longshoremen's and Harbor Workers' Compensation Act for the period commencing February 1, 1937, when he returned to work at a salary equal to (thereafter increased in July, 1937) the salary received at the time of his injury.

SPECIFICATION OF ERRORS

The appellants specify and rely upon each of the assigned errors, to-wit:

1. That the United States District Court for the Western District of Washington, Southern Division, erred in failing and refusing to overrule and deny the motion to dismiss of the defendant William A. Marshall, in that it appears from the complainant's complaint herein that the relief therein prayed for should be granted by the Court as a matter of law. (Tr. 116, 117).

2. That the United States District Court for the Western District of Washington, Southern Division, erred in granting the motion to dismiss of the defendant Wm. A. Marshall and in dismissing the complainant's bill of complaint herein and said action (Tr. 117).

3. That the United States District Court for the Western District of Washington, Southern Division, erred in granting the motion to dismiss of said defendant Wm. A. Marshall and erred in concluding that the complainant's bill of complaint herein failed to state facts sufficient in equity or law to entitle complainant to the relief prayed for (Tr. 117).

Inasmuch as the assigned errors are all directed to the one question here involved, they will for purposes of convenience be discussed together.

ARGUMENT

Summary

1. The compensation order and award violates the purposes of the Longshoremen's and Harbor Workers' Compensation Act.

2. The compensation order and award is not in accordance with the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

(a) The appellee Hugo has suffered no disability.

(b) There is no evidence to support the alleged decrease in wage-earning capacity.

1. The Compensation Order and Award Violates the Purposes of the Longshoremen's and Harbor Workers' Compensation Act.

Sec. 2 of the Longshoremen's and Harbor Workers' Compensation Act (Title 33 U. S. C., §902(10)) defines "disability" as follows:

> " 'Disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."

Sec. 8 of the Longshoremen's and Harbor Workers' Compensation Act (Title 33 U. S. C. §908) provides the amount of compensation allowable for disability and after providing for cases of permanent total disability, temporary total disability, and permanent partial disability covering injury to specified members, provides in subdivision (c)(21) for other cases of permanent partial disability as follows:

> "In all other cases in this class of disability the compensation shall be 66 2/3 per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, * * *."

and in subdivision (e) for cases of temporary partial disability as follows:

> "In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or other employment * * *."

The compensation order and award is believed to fall under the provisions of subdivision (e), although the

same error exists if it be deemed to fall under subdivision (c)(21).

As stated in *Baltimore & Philadelphia Steamboat Co. v. Norton*, 48 F. (2d) 57, 58 (C. C. A. 3):

> "The purpose of this act, as its title denotes, is to provide compensation to an injured longshoreman for his 'disability,' or incapacity occasioned by an injury, to earn the wages he had been receiving."

See: *Wheeling Corrugating Co. v. McManigal*, 41 F. (2d) 593 (C. C. A. 4);

Crowell v. Benson, 285 U. S. 22.

The test then is, has the injured employee's wage-earning capacity been reduced? The inquiry must not be restricted to the identical employment in which the employee was engaged at the time of the injury, but must extend to his wage-earning capacity in any other employment. Here the appellee Hugo has received a promotion and increase in salary in the same employment, and the situation is therefore not affected by the decision in *Spratt v. Crowell*, 4 F. Supp. 368 (D. C. Ala.).

There is no provision in the Act, so far as compensation for permanent or temporary partial disability is concerned, for compensation for pain and suffering or damages for injury to a member of the body in and of itself. *Washington Terminal Co. v. Hoage*, 79 F. (2d) 158, 161 (Ct. App., Dist. of Col.). The inquiry must be confined to earning capacity.

2. The Compensation Order and Award Is Not in Accordance With the Provisions of the Longshoremen's and Harbor Workers' Compensation Act.

(a) The Appellee Hugo has suffered no disability.

The appellee deputy commissioner and the district court erred in applying the test to the instant case. Although the appellee Hugo has, as the result of the injury, sustained a partial loss of his voice and suffers from shortness of breath upon exertion, he has suffered no loss in earning capacity.

The applicable portions of the Act, namely, Secs. 8(c)(21), 8(e), Title 33 U. S. C. §§908(c)(21), 908(e), were adopted by Congress from Sec. 15 of the Workmen's Compensation Law of the State of New York.

> *Bethlehem Shipbuilding Corp. v. Monahan,* 54 F. (2d) 349, 350 (C. C. A. 1);
>
> *Candado Stevedoring Corp. v. Locke,* 65 F. (2d) 802, 803 (C. C. A. 2).

As stated in *West Penn Sand & Gravel Co. v. Norton,* 95 F. (2d) 498, 499 (C. C. A. 3), quoting from *Capital Traction Co. v. Hof,* 174 U. S. 1:

> "It is familiar law that whenever Congress * * * has borrowed from the statutes of a state provisions which have received in that state a known and settled construction before their enactment by Congress, that construction will be deemed to have been adopted by Congress together with the text which it expounded and the provisions will be construed as they were understood at the time in the state."

See: *Luckenbach S. S. Co. v. Marshall,* 49 F. (2d) 625, 626 (D. C. Ore.);

Bethlehem Shipbuilding Corp. v. Monahan, 54 F. (2d) 349, 350 (C. C. A. 1);

Marshall v. Andrew F. Mahony Co., 56 F. (2d) 74, 77 (C. C. A. 9);

Candado Stevedoring Corp. v. Locke, 63 F. (2d) 802, 803 (C. C. A. 2);

Employers' Liability Assur. Corp. v. Monahan, 91 F. (2d) 130, 132 (C. C. A. 1).

In *Jordan v. Decorative Co.,* 230 N. Y. 522, 130 N. E. 634 (1921), it appears that the claimant suffered a partial disability on April 19, 1919, but remained in service until May 8, 1919, when he was discharged, and although his capacity for heavy work was impaired, if not destroyed, on June 1, 1919, he secured light work from another employer, receiving very soon the same wages as before the accident, and although continued employment was offered, he voluntarily left this employment on August 2, 1919, and was idle until October 4, 1919, a few days before the hearing. It was held that the evidence justified the finding that he was unable to obtain work during the first period between May 8 and June 1 and an award for that period was affirmed, but not for the second period between August 2 and October 4, the court, speaking through the late Justice Cardozo, stating in reference thereto:

> "Work was offered and refused. Earning capacity was then equal, if the claimant was willing to assert it, to capacity before the injury. We must hold him to the use of the powers which he had."

The court then proceeded to point out the distinction between awards for fixed amounts, such as for loss or injury of a member of the body, and awards based on wage earning capacity in the following language:

> "Cases such as this where the award is to be measured by the difference between wages and capacity are, of course, not to be confused with those where the act prescribes a fixed and certain limit, irrespective of the tendency of the individual to rise above or fall below it. * * *."

At the time of the enactment of the Longshoremen's and Harbor Workers' Compensation Act (1927) the sections of the New York statute here involved had a known and settled construction, namely, that where an employee suffered no decrease in earnings because of an injury, he was entitled to no award of compensation.

> *Op. State Industrial Commission*, 22 St. Dept. Rep. 270 (1920);
>
> *Reid v. Central Hudson Gas, etc. Co.*, 33 St. Dept. 145 (1925).

In *Humphreys v. Chevrolet Motor Car Co.*, 191 App. Div. 4, 181 N. Y. S. 3 (1920), it had been held that where an injured employee continues to work at the same wages he is not entitled to an award. In *Gillespie v. McClintic-Marshall Co.*, 215 App. Div. 734, 212 N. Y. S. 88 (1925), it had been held that where the employee after an accident refused work from his employer at a higher wage than he had been receiving, he could not have his present earning capacity valued on a lower basis.

See: *Pottle v. Wm. H. Atkinson Co.*, 215 App. Div. 739, 212 N. Y. S. 902 (1925).

The foregoing rule of construction has been consistently followed by the courts of New York.

In *Sullivan v. G. B. Seely Son*, 226 App. Div. 629, 236 N. Y. S. 377 (1929), affirmed 252 N. Y. 621, 170 N. E. 167, a case substantially identical to the case at bar, it appeared that during the entire time that the employee was disabled the employer continued to pay him his full salary, and in holding that he was not entitled to an award, the court said:

> "He therefore met with no economic loss during the period he was unable to work. * * * He has therefore gained greatly through the generous attitude of his employer.
>
> "By the decision of the board, the employer and its carrier will be obliged to pay $25 per week to the claimant in addition to his full wages. This would seem to pervert the purpose of the statute, which is to compensate the injured workman for loss of earning power (*Marhoffer v. Marhoffer*, 220 N. Y. 543, 116 N. E. 379), and to protect him against destitution during the period of disability. 'The act was not intended as a source of profit to the employee or as a means of punishment of the employer. * * *.' *Fredenburg v. Empire United Rys.*, 168 App. Div. 618, 623, 154 N. Y. S. 351, 354."

After discussing the evidence on the question as to whether the payments by the employer were by way of gift or wages, the court said:

> "It is sufficient to say that the employer, for reasons of its own, continued to pay the employee weekly

wages, and therefore the latter has suffered no loss of earnings.

"Having freely consented to accept a substantial benefit from his employer, all equitable rules would hold the claimant estopped from recovering another sum, not based on a loss arising during the term of disability. *Brassel v. Electric Welding Co. of America,* 239 N. Y. 78, 145 N. E. 745; *Larscy v. T. Hogan & Sons,* 239 N. Y. 298, 302, 146 N. E. 430."

followed in:

Griffin v. Cruikshank Co., 227 App. Div. 831, 237 N. Y. S. 786 (1929);

Smith v. Surf Apartments, 227 App. Div. 832, 237 N. Y. S. 897 (1929);

Beach v. Travelers' Ins. Co., 233 App. Div. 55, 252 N. Y. S. 1, 4 (1931);

Morris v. Morris, 234 App. Div. 187, 254 N. Y. S. 429, 433 (1931);

Nazy v. Adwol Co. Inc., 254 N. Y. S. 961 (1931).

See also:

Czaus v. LaLance Grosjean Mfg. Co., 230 App. Div. 586, 246 N. Y. S. 50 (1930);

Majors v. James Forrestal Co., 244 App. Div. 856, 279 N. Y. S. 779 (1935).

In *Hartford Accident & Indemnity Co. v. Hoage,* 85 F. (2d) 420 (Ct. App. Dist. of Col.), relied on by appellees, it appears that although the appellant in that case apparently called to the court's attention the binding force of the construction given to the New York statute by the citation of *Candado Stevedoring Corp. v. Locke,* 63 F.

(2d) 802, 803 (C. C. A. 2), the court's attention was not called to the authorities hereinabove stated construing the New York statute. On the contrary, the decision in that case rests entirely on decisions construing various compensation acts of other jurisdictions without a single reference to the known and settled construction given to the New York statute, and the court apparently rested its decision on a consideration only of the decisions directly called to its attention.

(b) There is no evidence to support the alleged decrease in wage-earning capacity.

The appellee deputy commissioner found the wage-earning capacity of the appellee Hugo at the time of his injury to be $75.00 per week; that upon his return to work he required an assistant who was paid $150.00 per month (Tr. 12). The appellee deputy commissioner, despite the fact that the appellee Hugo actually earned at all times since his return to work an amount equal to his earnings at the time of his injury, found that his wage-earning capacity in the open labor market was $34.62 per week (Tr. 12).

There is not a scintilla of evidence in the record to support the finding that the appellee Hugo's wage-earning capacity in the open labor market was $34.62 per week following his injury, or any finding other than that his earning capacity was exactly that amount which he was actually receiving.

Nowhere in the compensation order does the appellee

deputy commissioner indicate how the amount of $34.62 was arrived at, but by a process of mathematical computation we find that this amount is the weekly wage of the assistant who received $150.00 per month. There is nothing in the record to justify a finding that the appellee Hugo's earning capacity was but $34.62 per week, being that of said assistant, and the finding in this respect is wholly arbitrary and capricious.

It further appears from the record that although appellee Hugo received "$150 or something like that" when getting "used to it" following his recuperation during the period October, 1936, to January, 1937 (Tr. 24), it clearly appears that when he actually returned to work on February 1, 1937, he received $300.00 per month, the amount previously received (Tr. 24, 83, 94) and not $325.00 per month as found by the appellee deputy commissioner, and that he was thereafter, in July, 1937, promoted to general superintendent and his salary was then increased to $325.00 per month (Tr. 92, 94) and he no longer worked with an assistant (Tr. 55).

In *Giovanniello v. Transit Development Co.*, 212 App. Div. 108, 208 N. Y. S. 581 (1925), it is held that the extent of the earning capacity of a claimant must be proved and not fixed arbitrarily as was here done by the appellee deputy commissioner.

See: *Vogler v. Ontario Knife Co.*, 223 App. Div. 550, 229 N. Y. S. 5 (1928);

Cooper v. Chateaugay Ore & Iron Co., 225 App. Div. 703, 231 N. Y. S. 441 (1928).

CONCLUSION

It is respectfully submitted that the district court erred in entering its final decree dismissing appellants' bill of complaint and that said decree should be reversed with instructions that the compensation order and award of the appellee deputy commissioner should be set aside as being contrary to law.

Respectfully submitted,

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No. 8976

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TWIN HARBOR STEVEDORING & TUG COMPANY, a corporation, and FIREMAN'S FUND INSURANCE COMPANY, a corporation,

Appellants,

— v. —

WM. A. MARSHALL, Deputy Commissioner Fourteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and OTTO HUGO,

Appellees.

Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division

HONORABLE EDWARD E. CUSHMAN, *Judge*

BRIEF OF APPELLEE,

Deputy Commissioner

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HONORABLE EDWARD E. CUSHMAN, *Judge*

BRIEF OF APPELLEE,

Deputy Commissioner

STATEMENT OF THE CASE

No dispute exists between the parties over the facts involved in this matter, but on behalf of the appellee Wm. A. Marshall, Deputy Commissioner, cer-

tain facts will be set forth here in addition to those contained in appellant's brief.

The record of all proceedings before the appellee Deputy Commissioner has been incorporated with the bill of complaint by stipulation (Tr. 18). That record shows that at the time the employee, Otto Hugo, was injured, both the employer and the employee were subject to the Longshoremen's and Harbor Workers' Compensation Act; that the relationship of employer and employee existed at the time of the injury to Hugo; that at the time of the injury, Hugo was performing services growing out of and incident to his employment; that the average annual earnings of Hugo at the time of his injury amounted to the sum of Thirty-nine Hundred ($3,900.00) Dollars; and that prior to October 19th, 1937, the employer had paid Hugo Twenty-one Hundred Twenty-five $2,125.00) Dollars as compensation (Tr. 21).

The appellee Deputy Commissioner, in determining the question of the disability which Hugo suffered as a result of his injury, had the evidence before him for consideration which is contained in the transcript from pages 22 to 97, inclusive. The following stated facts are not intended as a complete resume of all the evidence heard by the appellee Deputy Commissioner, but rather as supplemental to that given in appellants' brief.

Hugo's injury resulted from his having been struck on the shoulder and larynx by a set of tongs which were being used to pull logs, when those tongs broke loose and swung against Hugo (Tr. 23). He was totally disabled from December 13th, 1935 to some time in December of 1936, and returned to work on February 1st, 1937 (Tr. 21, 23, 24). One cord inside Hugo's neck is completely gone, and another was injured and thrown out of place (Tr. 23). When Hugo returned to work it was found necessary to employ an assistant for him, to convey his orders and generally aid Hugo (Tr. 25). Hugo's work required that he continuously climb about the ships and make use of his voice (Tr. 33, 35), and he and his assistant found that, as a result of the stated injury, Hugo found it difficult to talk to the men who were working under his direction, and also found that he became exhausted in attempting to perform his regular duties (Tr. 25, 56). He further discovered that he was unable to make himself understood over the telephone (Tr. 27, 29); that he was unable to procure a master's license by reason of the impairment he had suffered (Tr. 27); that if he should lose his employment with appellant Twin Harbor Stevedoring & Tug Company, he would be unable to secure like employment with some other employer (Tr. 27, 49, 50, 56); and that he would be unable to perform the work required in general longshoring (Tr. 28, 30).

On or about July 1st, 1937, Hugo's duties were changed to those of a superintendent, which position was designated by him as a "political" or "sympathetic" job (Tr. 26).

The physician who first treated Hugo following the latter's injury asserted it had caused a partial loss of voice and shortness of breath (Tr. 38); that Hugo had suffered a loss of 90% of his audible voice and has to talk in whispers (Tr. 39); and that such condition is permanent (Tr. 39, 40).

It was not a customary practice to have an extra man assisting the foreman in the performance of his duties (Tr. 54), and the man so hired to aid Hugo when the latter returned to work was especially employed to convey Hugo's orders orally (Tr. 54).

Other employees who were acquainted with Hugo prior to and following his injury, found that he suffered from shortness of breath and loss of voice as a result of the injury (Tr. 59, 68, 69); that Hugo's ability to work has been materially and adversely affected (Tr. 62), and one of them asserted that Hugo would now have no chance of getting a job with some other employer (Tr. 62).

Frank A. Hill, Manager of the Twin Harbor Stevedoring & Tug Company, who has been acquainted with Hugo since the latter entered the employ of that com-

pany in 1923, testified that Hugo has suffered a disability (Tr. 88); that he is unable to accomplish the work he did prior to his injury (Tr. 90); that his efficiency has declined (Tr. 91); that the company had not dismissed Hugo following his return to work, on account of his impairmen, because of the meritorious work he had performed (prior to his injury) (Tr. 92); that the company has no need for a superintendent (that is, for a man to perform the duties which Hugo has carried on since July 1st, 1937), but that Hugo's ability as a foreman had diminished to the point where it became necessary for the company to replace him, and his present position was created in recognition of his long service with the company (Tr. 94, 95). Mr. Hill stated his opinion to be that, *because of the vocal disability and breathing impairment suffered by Hugo, he could not now get another position as a foreman or superintendent,* and that he (Hill) would not now hire Hugo as a stevedore foreman (Tr. 96). (Italics supplied).

The findings of fact and award of appellee Deputy Commissioner were based upon the testimony, of which the above stated facts were a part (Tr. 98, 102), and he found that the wage-earning capacity of the claimant, in the open labor market, has been decreased from $75.00 per week to $34.62 per week (Tr. 100, 101), and awarded compensation of $25.00 per week

to Hugo during the continuance of his disability (Tr. 102).

By direction of the Attorney General of the United States, and in accordance with Section 921(a), Title 33 United States Code, the undersigned United States Attorney and Assistant United States Attorney appeared in this cause on behalf of appellee Deputy Commissioner, and moved to dismiss the appellants' bill of complaint in the District Court on the grounds that the said bill failed to state facts sufficient in equity or in law to entitle the complainants to the relief prayed for, or for any relief, and the complainants' bill, taken together with the record of the Deputy Commissioner, affirmatively established that there was competent evidence to support the findings and award of said Deputy Commissioner (Tr. 17, 18); that motion was granted (Tr. 112, 113) in accordance with the prior memorandum decision of the District Court (Tr. 103, 110).

STATEMENT OF THE QUESTION INVOLVED

The sole question involved herein is whether the Deputy Commissioner erred in not determining the employee's "wage-earning capacity" subsequent to February 1st, 1937, the date the employee returned to work, solely on the basis of the salary paid to him thereafter by the employer. Or, in other words,

whether the salary paid to the employee subsequent to February 1st, 1937, should be regarded as conclusively establishing his "wage-earning capacity," which the Deputy Commissioner was required to find in computing the employee's compensation for partial disability under Section 8 (c) (21) or Section 8 (e) of the Longshoremen's Act, Title 33 United States Code, Sections 908 (c) (21) and 908 (e).

ARGUMENT

The findings of fact of the appellee Deputy Commissioner are amply supported by competent evidence, and should therefore be regarded as final.

The injured employee, Otto Hugo, has been paid compensation for *temporary total disability* from December 13th, 1935, the date of his injury, to and including January 31st, 1937, and has been awarded compensation for *partial disability* from and after February 1st, 1937, on the basis of a decrease in his wage-earning capacity from $75.00 per week to $34.62 per week.

An examination of the testimony taken at the hearings held before the appellee Deputy Commissioner reveals that his findings of fact are supported not only by competent evidence, but by evidence which is conclusive, there being nothing in the record to contradict that testimony, and therefore the findings of

fact herein should be regarded as final and conclusive.

Crowell v. Benson, 285 U. S. 22, 46, 47, 54;

Del Vecchio v. Bowers, 296 U. S. 280, 287;

Voehl v. Indemnity Insurance Co. of North America, 288 U. S. 162, 166;

Pacific Employers' Insurance Co. v. Pillsbury, (CCA9) 61 F. (2d) 101, 102;

Northwestern Stevedoring Co. v. Marshall, (CCA9) 41 F. (2d) 28, 29.

In the *Northwestern Stevedoring Co.* case, *supra*, the Ninth Circuit Court of Appeals, in affirming the decision of the District Court of the United States for the Western District of Washington, Southern Division, laid down the following rule:

> " * * * the act (Longshoremen's and Harbor Workers' Compensation Act) does not contemplate the hearing of a case determined by a Commissioner *de novo* in the District Court, but merely a review of the proceedings before him to determine whether there was some competent evidence to support the findings of fact made, and whether he acted within the jurisdiction conferred upon him by the Act and in accordance with its provisions. As to questions of fact, the findings of the Commissioner are to be final, if supported by some competent evidence (Citing Cases.)"

No question has been raised in this case by appellants with respect to whether or not the appellee Deputy Commissioner acted within the jurisdiction conferred upon him by the Longshoremen's Act, and

as has been pointed out by the appellants on page 5 of their brief, the District Court, in its memorandum decision, stated that there was competent evidence upon the hearing before the Deputy Commissioner to support the compensation order made.

THE ACTUAL WAGES PAID TO A PARTIALLY DISABLED EMPLOYE DO NOT CONCLUSIVELY ESTABLISH HIS "WAGE-EARNING CAPACITY"

There is no dispute over the fact that the employer has paid this disabled employee $325.00 per month since he resumed work on February 1st, 1937, but, on the other hand, the employee now is and has been suffering a disability as a result of the serious injury he sustained, as found by the appellee Deputy Commissioner. It appears clear from the evidence that the salary, or actual wages paid to the employee, do not fairly and reasonably represent his actual wage-earning capacity, particularly if he were forced to compete in the open labor market.

He began working for his present employer in 1922 or 1923, and was a faithful and efficient employee from then until the time of his injury. He was re-employed by the appellant employer for the reason that the company wished to assist him financially and recognize his past efficient service in its behalf. The employee himself has described his present work as

"a kind of political job" or "sympathetic job." In the event he were forced to compete in the open labor market, it is clear that his wage-earning capacity would not be anything like $325.00 per month. It is repeatedly shown by the testimony that he could not secure like employment with some other employer, were he to lose his present job.

"Wage-earning capacity," as construed by the weight of authority, means "an employee's ability to earn," taking into consideration his impaired physical condition. There is nothing in the Longshoremen's and Harbor Workers' Act, Title 33 United States Code, Section 900 et seq., which provides that the actual salary or wages paid to an injured workman shall form the basis of a computation of his compensation. As stated in Schneider's Workmen's Compensation Law, Vol. 2, Second Edition, page 1441:

> "If the employee's physical efficiency has been substantially impaired, the fact that he is employed at the same work, or *at the same or higher wages*, will not as a rule disentitle him to compensation, unless it is expressly so provided in the Act under which the claim is made." (Italics supplied.)

By reason of the generosity of this employer, the appellee Hugo is presently receiving $325.00 per month, and in addition thereto $25.00 per week as compensation, which makes a total in excess of the

amount he was earning at the time of his injury. This does not affect the liability of the insurance carrier to pay the award, which is to compensate the employee for the disability he has suffered and will, no doubt, continue to suffer the rest of his life. An employee should be compensated for disability suffered by him as a result of any injury he may have sustained. This is particularly true in view of the rule of liberality of construction so often stressed by the Courts in considering Workmen's Compensation Laws, and recognized by the Supreme Court of the United States in considering the Longshoremen's and Harbor Workers' Act in *Baltimore & Philadelphia Steamboat Co. v. Norton, Deputy Commissioner*, 284 U. S. 408, 414.

A case directly in point and which, it is submitted, should be regarded as controlling, is that of *Hartford Accident and Indemnity Co. v. Hoage, Deputy Commissioner*, (CA DC) 85 F. (2d) 420, which arose under the Longshoremen's Act as applied in the District of Columbia, and was decided June 29th, 1936. The Court, speaking through Chief Justice Martin, said (at page 422):

> "The fact that Cooley's (the employee) employer continued to pay him the sum of $19.23 per week for his wages while suffering from his injuries does not prove that his wage-earning capacity was not diminished by his injury. The em-

ployer evidently continued to pay the full amount of Cooley's former salary to him after his injury, not because his wage-earning capacity continued the same, but upon the ground that this amount was needed by Cooley because 'he had to live.'

"The fact that Cooley because of these circumstances may receive $25.38 per week, a sum in excess of his former wages, does not add to the liability of the insurance carrier who is called upon to contribute only the sum of $6.15 a week, being the sum established as the decrease of earning capacity of Cooley as defined by the statute. Accordingly, the apparently excessive sum which Cooley may receive because of the payment of his former wages by his employer imposes no increased burden upon the carrier. The converse of this situation appears in cases where the injured employee entirely discontinued work, although sustaining but a partial injury. In such cases the insurance carrier is held to contribute only the decrease in the wage-earning capacity of the injured employee and no more. In both illustrations the injury is compensable and the carrier is compelled to pay only the decrease in the working capacity of the employee regardless of whether during the period he earns as much as his former wages, or earns nothing whatever.

"It is established by the authorities that the payment of a greater sum than the wage-earning capacity of an injured employee after the injury does not deprive him of a recovery of compensation under section 8(e), supra." (Section 908(e) Title 33, United States Code.)

The principle involved in the present case is discussed at length by the Supreme Court of Vermont in the leading case of *Roller v. Warren*, 129 Atl. 168, wherein the Court sustained an award to an employee

for "total disability for work," although the employee was being paid an average of $7.00 a week for light work. It was contended in that case that a workman cannot be totally disabled for work when he can get employment and perform the duties thereof. That Court refused to sustain such contention, saying, at page 170:

> "The weakness of the argument is that it gives conclusive effect to the single circumstance that the workman performs some service for pay and wholly disregards the question of the fitness of the service to his impaired condition and his capacity to perform the same."

The opinion of Chief Justice Waste, of the Supreme Court of California, in the case of *Postal Telegraph Cable Co. v. Industrial Accident Commission of California*, 3 Pac. (2d) 6, and the leading authorities therein cited, appear to be in point. There the Court reached the following conclusion, which is in accordance with the weight of authority (at page 8):

> "We are of the view that it definitely appears from these cases, which indicate the trend of judicial decision, that the right to compensation is not lost or diminished by the injured employee's return to work at the same or a different wage than that theretofore earned by him."

In the case of *Candado Stevedoring Corporation v. Locke, Deputy Commissioner*, (CCA2) 63 F. (2d) 802, 803, which arose under the Longshoremen's Act, the

Court, citing a number of New York authorities, said at page 803:

> "What Bloomburg (the injured employee) actually earned is not the basis of the computation, but what was his earning capacity. The fact that he has actually earned nothing since December 22, 1930 *is not the test of the amount of his compensation. Such has been the uniform construction of the New York State Compensation Statute* (Consol. Laws N. Y. c. 67) on which Section 8(c) (21) of the Longshoremen's and Harbor Workers' Compensation Act was modelled." (Section 908(c) (21) Title 31, United States Code.) (Italics supplied.)

In the case of *Czaus v. LaLance Grosjean Manufacturing Co.*, 246 N. Y. S. 50, the court said, at page 52:

> "It was claimant's duty to make an effort to do the 'suitable' work offered to him, unless he was willing to have his earning capacity fixed accordingly. The award must be fixed upon the basis of claimant's *capacity to earn, and not alone on actual wages received.*" (Italics supplied.)

Attention is also called to the case of *Mead v. Buffalo General Electric Co.*, 208 N. Y. S. 499, which arose under the New York Workmen's Compensation Law, and in which the court said:

> "The wage-earning capacity has not been found in this case. *It is not necessarily the equivalent of actual earnings.* * * * The board has a legal right to accept the claimant's contention of inability to work, as against the testimony above mentioned,

> including that of his own witnesses; but in such case it is perhaps of more than ordinary importance that the board strictly conform to the requirement of the statute, and find, as the statute requires, that the *earning capacity* of the claimant is the basis for an award, *and not rest the award on what he actually earned.*" (Italics supplied.)

In the case of *Luckenbach Steamship Co. v. Norton, Deputy Commissioner*, (CCA 3) 96 F. (2d) 764, 765, which was decided April 25th, 1938, that Court had before it for consideration the identical question which is being presented here: that is, whether or not the disabled employee "is entitled to compensation in view of the fact that the employer has at all times since the accident paid him full wages, and even advanced his wages," and it was held, at page 765:

> "Assuming that Dolan (the employee) does suffer from partial disability, as the Commissioner found, the fact that the defendant (employer) paid him full wages is not a bar to the award of compensation here involved. (Citing cases.)"

IF A DISABLED EMPLOYEE'S RIGHT TO COMPENSATION IS CONCLUSIVELY CONTROLLED BY THE AMOUNT OF WAGES PAID HIM, THE PURPOSE OF THE LONGSHOREMEN'S ACT MAY BE DEFEATED

The authority of a Deputy Commissioner to review a compensation case is limited, under Section 22 of

the Longshoremen's Act, Title 33 United States Code, Section 922, to "one year after the date of the last payment of compensation." Under Section 13(a) of the Act, Title 33 United States Code, Section 913(a), the right to compensation is barred unless a claim is filed within one year after the injury. If the employee's right to compensation for loss of wage-earning capacity were to be determined upon the actual wages or payments made to him by the employer, regardless of the employee's physical condition as a result of the injury, and all other relevant circumstances, including future impairment of such capacity, unscrupulous employers might, with profit to themselves continue with the wages of an injured employee suffering temporary partial or permanent partial disability, particularly an employee receiving low wages, until the limitations under the Act, with respect to the filing of a claim for compensation and right to review of the case, had run; after which the employee's right to compensation would be barred and the employee, if cast adrift, might remain an object of charity. Should the employer be able to escape liability to pay compensation by merely retaining the disabled employee in his employ until the limitations in the Act had run, the injured employee would thus go uncompensated and the beneficent purposes of the Longshoremen's Act would be defeated. A reasonable consideration of the Longshoremen's Act does not lead

to any such conclusion, and that has been particularly recognized by the Court in the case of *Luckenbach Steamship Co. v. Norton, Deputy Commissioner*, (CCA3) 96 F. (2d) 764, wherein the Court said at page 765:

> "Since the Act provides that compensation for either permanent partial disability, 33 U.S.C.A. 908(c) (21), or for temporary partial disability 908(e), shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage earning capacity thereafter, it would seem that an employer who has continued to pay the employee full wages has already paid him more than he could have been required to pay under the Act, and should not be required to pay more. But, if, by merely paying an employee full wages during the one-year period of limitation for filing a claim for compensation, an employer could possibly escape liability to pay any compensation thereafter, he would thus defeat the purpose of the Act."

It will be seen from the foregoing cases that the settled construction given to the New York Compensation Statute and the weight of authority in the Federal Courts in construing the Longshoremen's and Harbor Workers' Act is that the "wage-earning capacity" of a partially disabled employee must be fixed upon the basis of such employee's capacity to earn, and not alone on actual wages or salary paid to that employee.

THE APPELLEE DEPUTY COMMISSIONER'S AWARD IS CONSONANT WITH THE LONGSHOREMEN'S ACT

In computing the compensation for permanent partial disability, the appellee Deputy Commissioner was required to determine the loss suffered by Hugo in his wage-earning capacity in the same employment or otherwise. The method of computing compensation in this class of disability is not covered by the schedule in Section 8(c) of the Longshoremen's Act, Title 33 United States Code, 908(c), but is governed by Section 8(c) (21) of that Act, Title 33 United States Code, Section 908(c) (21), and while it might often be difficult to determine the wage-earning capacity of the employee thereunder, if the findings of the Deputy Commissioner with respect thereto are fairly supported by the facts and circumstances of the case as they appear to be here, it is submitted that they should be sustained by the Court.

The difficulty in determining the exact loss in wage-earning capacity was recognized by the Circuit Court of Appeals for the Third Circuit in case of Independent Pier Co. v. Norton, Deputy Commissioner, 54 F. (2d) 734, in which case the Court stated, at page 736:

> "When there is a finding of partial disability, there is always, from the very nature of such cases, trouble in finding and deciding the pre-

cise proportion or percentage of disability reflecting loss in wages. That it was something less than one hundred per cent, is, of course, not contested in view of the finding of a change from total disability to partial disability. The finding that disability, partial in degree, still existed and prevented Morley from returning to his work and earning wages as a stevedore was in effect a find-

ing that he was able to do some lighter work producing wages. *That his partial disability produced a wage loss precisely equal to twenty-five per cent of his average weekly wages, there was, of course, no evidence, as we surmise that such cases are rarely susceptible of evidence of wage loss with mathematical precision.* The finding therefore was an approximation which, when nothing else is possible, is permissible in administering this Act if fairly supported by the facts and circumstances of the case, as is indicated by the terms of the act (section 23, infra (33 U.S. C.A. Sec. 923) liberalizing the procedure." (Italics supplied)

In *Lumber Mutual Casualty Insurance Co. of New York v. Locke, Deputy Commissioner,* (CCA2) 60 F. (2d) 35, an injured longshoreman was awarded compensation for permanent partial disability under Section 8(c) (21) of the Longshoremen's Act, and a finding was made (see page 37):

> "That, physically, the claimant was able to do light work, but that, owing to his mental condition, he had no earning capacity and that he would 'never make a full recovery or be able to engage in laborious work'."

The employee was awarded compensation on the basis of two-thirds of his "former weekly wages," and the Court sustained the award, saying (page 37):

> "Upon the proof it cannot be said that the findings were so without evidence as to require the District Court to set aside the order of the Deputy Commissioner * * * as 'not in accordance with law.' We cannot weigh the facts. Fact finding is within the sole province of the Commission."

Moreover, the appellee Deputy Commissioner was entitled to use his own judgment and knowledge in determining the "wage-earning capacity" of a disabled employee. On this point attention is particularly invited to the opinion of the Supreme Court of Massachusetts in *O'Reilly's case,* 164 N. E. 440 wherein it was said, at page 440:

> "The sole contention of the insurer is that it was error for the board to find 'an arbirtrary earning capacity in the absence of evidence as to what the employee could have earned after his total incapacity ceased.' Of course, the burden rested on the employee to prove facts necessary to entitle him to compensation. Sponatski's Case, 220 Mass. 526, 108 N. E. 466, L. R. A. 1916A, 333, Sanderson's Case, 224 Mass. 558, 561, 562, 112 N. E. 355. *But in the absence of testimony as to the earning capacity of the employee, the members of the board are entitled to use their own judgment and knowledge in determining that question.* In Maynard v. Royal Worcester Corset Co., 200 Mass. 1, 85 N. E. 877, an action to recover for breach of a contract of employment, it was said at page 8 of 200 Mass. (85 N. E. 880): 'The judge was

not precluded from using his own knowledge of practical affairs or applying his judicial sense to the consideration of a matter of such common occurrence as securing employment.' In Walsh's Case, 227 Mass. 341, 116 N. E. 496, 6 A. L. R. 567, where the same question arose as is presented in the case at bar, it was said at pages 344, 345 of 227 Mass. (116 N. E. 497): '*We are of opinion that in determining the amount which can* be *earned by a day laborer the committee and board had a right to act upon their own knowledge*'." (To the same effect is the opinion of the court in Mercury Aviation Co. v. Industrial Accident Commission of California, 186 Cal. 375, 119 Pac. 508). (Italics supplied.)

In the case of *Northwestern Stevedoring Co. v. Marshall,* (CCA9) 41 F. (2d) 28, the findings of a Deputy Commissioner were contested when he found a forty per cent permanent partial disability of the claimant's right leg, as a result of the injury sustained by claimant, and upon that disputed question the Court said, at page 30:

"It being conceded that claimant suffered disability in some degree as a result of the accident, the commissioner could not escape the duty of making an award; he could not send the claimant away empty handed merely because in the nature of things the latter's injury was not susceptible to any definite or certain admeasurement. The administration of justice is a practical function, and we must do the best we can with the means available. The commissioner's award may have been liberal, but we cannot say it was arbitrary or capricious; and hence it ought not to be disturbed."

In computing Hugo's compensation, the appellee Deputy Commissioner should not be required to accept the salary paid to him by his present employer as representing in truth and in fact Hugo's "wage-earning capacity."

APPELLEE'S ANSWER TO APPELLANTS' ARGUMENT

The argument and authorities contained in appellants' brief wholly fail to substantiate the conclusions for which they contend. To say that the appellee Hugo has suffered neither *disability* nor a *decrease in wage-earning capacity* would seem to be simply flying in the face of the conclusive testimony to the contrary which is contained in the record submitted by the appellee Deputy Commissioner, and to which attention is called in the Statement of the Case above.

Counsel for the appellants have failed to call attention to any Federal Court case construing the Longshoremen's Act which supports the construction here advanced by the appellants. While counsel for the appellants have included in their brief an extended argument in an effort to convince this Court that the New York Workmen's Compensation Law, upon which the Longshoremen's Act was modelled, supports their contention that Hugo is not entitled to compensation for the period in question because of the salary paid

to him by the employer during that period, that argument overlooks two factors: first, the New York cases so cited by them do not support that contention; second, the Federal Courts, in construing the Longshoremen's Act, are not conclusively bound to give it the same construction as may previously have been given the New York Workmen's Compensation Law by the New York Courts.

None of the New York cases cited by counsel for the appellants involved the determination of the partially disabled employee's "wage-earning capacity," based upon wages or salary paid to such employee during any period of partial disability. The cases of

Jordan v. Decorative Co., 230 N. Y. 522, 130 N. E. 634;

Gillespie v. McClintic-Marshall Co., 215 App. Div. 734, 212 N. Y. S. 88;

Majors v. James Forrestal Co., 244 App. Div. 856, 279 N. Y. S. 779,

all involved questions with respect to the offer of work to the employee by the employer, and the former's refusal to accept such work—questions not at all pertinent to the issue involved in the present case. The case of *Sullivan v. G. B. Seely Son*, 226 App. Div. 629, 236 N. Y. S. 377 (1929), affirmed 252 N. Y. 621, 170 N. E. 167, did not involve any question relating to the present issue. We have previously in this brief

called attention to the pertinent portion of the case of *Czaus v. LaLance Grosjean Mfg. Co.*, 230 App. Div. 586, 246 N. Y. S. 50.

It is to be noted that the New York cases of *Czaus v. LaLance Grosjean Mfg. Co., supra,* and *Mead v. Buffalo General Electric Co., supra,* and *Candado Stevedoring Corp. v. Locke, Deputy Commissioner, supra,* arising in the Second Circuit, have fully accepted the principle that an employee's actual wages may or may not represent his wage-earning capacity.

A greater reason exists why this principle should be accepted under the Longshoremen's Act, for, as previously indicated in this brief, while an employer under the Longshoremen's Act might retain an employee on the payroll at the same wage he received at the time of his injury, or even at a higher rate of wage, until one year from the date of last payment of the compensation had elapsed, and then discharge the employee—who would be unable, because of the time limitation (Section 13 (a) and 22 of the Longshoremen's Act, Section 913(a) and 922 of Title 33, United States Code) to claim compensation for loss of wage-earning capacity—such a situation would not arise in New York, where, by Section 123 of the New York Workmen's Compensation Law (McKinley's Consol. Laws of New York Annotated, Book 64, Ch. 67, Sec. 123) the board has continuing jurisdic-

tion over a case, there being no time limitation to affect the claimant's rights.

In the case of *Spratt v. Crowell*, (DC Ala.) 4 F. Supp. 368, 369, the Court had before it for consideration the following sections of the Longshoremen's Act: Title 33 United States Code, Sections 908(c) (21) and 908 (e), and it was there "urged that these provisions were copied from the Disability Act of New York (Consol. Laws N. Y. c. 67) and hence the New York construction of that Act becomes binding." In answer to that contention the Court said, at page 369;

> "The New York Act is a general compensation act covering practically all the various activities employing workmen, while the Longshoremen's and Harbor Workers' Compensation Act is a limited one covering only one general class of work, so it can be easily seen than many expressions found in one of these Acts will be found inapplicable to the other, so that the definitions or constructions placed upon these should not be held binding when questions arise under the other, unless it is clear that they apply."

CONCLUSION

It is respectfully submitted that the compensation order and award made by the appellee Deputy Commissioner was based upon competent, substantial and conclusive evidence, and therefore the findings of fact and the award herein, being in all respects valid, should not be disturbed by this Court; that the order

of dismissal of the appellants' action, as made by the District Court based upon its memorandum decision herein, was in all respects valid and proper and should be sustained.

Respectfully submitted,

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United States Attorney.
OLIVER MALM,
Assistant United States Attorney,
Attorneys for Appellee,
Deputy Commissioner.

No. 8976

United States Circuit Court of Appeals

For the Ninth Circuit

WIN HARBOR STEVEDORING & TUG COMPANY, a corporation, and FIREMAN'S FUND INSURANCE COMPANY, a corporation, *Appellants*,

vs.

WM. A. MARSHALL, Deputy Commissioner Fourteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and OTTO HUGO, *Appellees*.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

REPLY BRIEF OF APPELLANTS

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UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

REPLY BRIEF OF APPELLANTS

In the brief of appellants the following arguments are made:

(a) The appellee Hugo has suffered no disability.

1. That inasmuch as the applicable portions of the Act (Secs. 8 (c) (21), 8 (e), Title 33 U. S. C. §§908 (c) (21), 908 (e)) were adopted by Congress from Section 15 of the Workmen's Compensation Law of the State of New York, the known and settled construction thereof

by the courts of New York will be deemed to have been adopted by Congress, together with the text (Appellant's Br. 9, 10).

2. That the known and settled construction of Section 15 of the Workmen's Compensation Law of the State of New York does not permit of an award of compensation for partial disability where the employee suffers no decrease in earnings because of an injury (Appellants' Br. 10-13, inc.).

The appellee takes no exception to the first argument, nor to the authorities cited in support thereof, but urges that the Federal Courts in construing the Act are not "conclusively bound" to give it the same construction given to the Workmen's Compensation Law of the State of New York (Appellee's Br. 23).

In support of this proposition appellee relies on *Spratt v. Crowell*, 4 F. Supp. 368 (D. C. Ala), (Appellee's Br. 25), in which the court stated that the only question presented was whether the injured employee must accept work of an entirely different character and of a kind not covered by or within the protection of the Act. The court recognized that under the provisions of the Workmen's Compensation Law of the State of New York, from which the provisions of the Act in question were adopted, the New York courts had held that a partially disabled workman is required to take any lighter work that may be tendered him. The court, however, held that under the Act the work tendered must likewise be within the protection of the Act and that the injured

longshoreman whose claim was being considered was not required to accept the tendered work of cutting grass. Assuming this to be a proper interpretation of the Act, the case has no application here for as pointed out, the appellee Hugo has received a promotion and increase in salary in the same employment (Appellants' Br. p. 8).

The appellee takes exception to the second argument by stating that the New York cases cited by appellants do not support the contention (Appellee's Br. 23).

It is contended that the cases of *Jordan v. Decorative Co.*, 230 N. Y. 522, 130 N. E. 634; *Gillespie v. McClintic-Marshall Co.*, 215 App. Div. 734, 212 N. Y. S. 88, and *Majors v. James Forrestal Co.*, 244 App. Div. 856, 279 N. Y. S. 779, are not pertinent to the issues here. In each of these cases an award of compensation for partial disability was denied where the employee, although capable, refused employment which would have allowed of earnings equal to those before the injury. With this contention we cannot agree. These decisions result from the settled construction given by the courts of New York that where the employee suffers no decrease of earnings because of any injury, no award of compensation may be made. Necessarily, where the injured employee refuses employment and thus himself prevents such earnings, he is not entitled to an award of compensation and these decisions so hold.

Appellee states that *Sullivan v. G. B. Seely Son*, 226 App. Div. 629, 236 N. Y. S. 377, affirmed 252 N. Y. 621, 170 N. E. 167, did not involve any question relating

to the present issue (Appellee's Br. 23). This case, which as stated in appellants' brief at page 12, is substantially identical to the case at bar, cannot thus be disposed of, but on the contrary it appears that this case involves and disposes of the question presented in the case at bar, as do the cases which follow it, to-wit:

Griffin v. Cruikshank Co., 227 App. Div. 831, 237 N. Y. S. 786;

Smith v. Surf Apartments, 227 App. Div. 832, 237 N. Y. S. 897;

Beach v. Travelers' Ins. Co., 233 App. Div. 55, 252 N. Y. S. 1;

Morris v. Morris, 234 App. Div. 187, 254 N. Y. S. 429;

Naxy v. Adwol Co., Inc., 254 N. Y. S. 961 (Appellants' Br. 13)

and

Op. State Industrial Commission, 22 St. Dept. Rep. 270;

Reid v. Central Hudson Gas, etc. Co., 33 St. Dept. Rep. 145;

Humphreys v. Chevrolet Motor Car Co., 191 App Div. 4, 181 N. Y. S. 3;

Pottle v. William H. Atkinson Co., 215 App. Div. 739, 212 N. Y. S. 902 (Appellants' Br. 11, 12),

which preceded it, none of which is referred to by appellee.

The case of *Czaus v. LaLance Grosjean Mfg. Co.*, 230 App. Div. 586, 246 N. Y. S. 50, relied upon by appellee (Appellee's Br. 14) is not to the contrary. In that case the injured employee was a machine nailer earning $25.33 per week and was offered suitable work by his employer at $20.00 per week, which he refused, and worked as a real estate salesman. The court reversed an award of compensation based on the lesser earnings as a real estate salesman, stating:

> "The board has ignored this offer of suitable employment in fixing earning capacity and has fixed it at much less, based upon claimant's actual earnings during the time he was actually employed as a real estate salesman. We see nothing * * * to justify fixing earning capacity at less than the amount offered by the employer, beginning at the time of the offer."

It was with reference to these facts that the court used the language quoted by appellee, to-wit:

> "It was claimant's duty to make an effort to do the 'suitable' work offered to him, unless he was willing to have his earning capacity fixed accordingly. The award must be fixed upon the basis of claimant's capacity to earn, and not alone on actual wages received."

The case of *Candado Stevedoring Corp. v. Locke*, 63 F. (2d) 802, 803 (C. C. A. 2), cited by appellants in support of their first argument (Appellants' Br. 9, 10, 13) and cited by appellee (Appellee's Br. 13, 14) against appellants' second argument, does not support appellee's contention. In that case the injured longshoreman was

able to do light work, but the deputy commissioner nevertheless awarded him compensation as "without earning capacity," which order was reversed. It was with reference to these facts that the court used the language quoted by appellee, to-wit:

> "What Bloomburg (the injured employee) actually earned is not the basis of the computation, but what was his earning capacity. The fact that he has actually earned nothing since December 22, 1930, is not the test of the amount of his compensation. Such has been the uniform construction of the New York State Compensation Statute (Consol. Laws N. Y. c. 67) on which Section 8 (c) (21) of the Longshoremen's and Harbor Workers' Compensation Act was modelled." (Section 908 (c) (21) Title 31, United States Code)."

The court cited in support of this quotation, *Mead v. Buffalo General Electric Co.*, 212 App. Div. 191, 208 N. Y. S. 499, cited by appellee (Appellee's Br. 14). In this latter case the injured employee, although able to work, did not do so and in reversing a compensation award based on actual earnings, the court used the language quoted by appellee (Appellee's Br. 14, 15).

We believe it correct to say that actual earnings are not the basis of an award under the statute as construed by the New York courts where the earnings are less than the injured employee was capable of earning, but where the actual earnings are equal to those prior to injury no economic loss has resulted and no award of compensation may be made.

We see no value in referring to decisions by courts of

states other than New York, as the many decisions on the varying statutes of the several states are of no aid here in construing the language of the Act. We point out that appellee, however, has been forced to look elsewhere for authority and cites and relies upon *Roller v. Warren*, 129 Atl. 168 (Vt.) (Appellee's Br. 12); and *Postal Telegraph Cable Co. v. Industrial Accident Commission of California*, 3 Pac. (2d) 6 (Cal.) (Appellee's Br. 13). It is further to be noted that the quotation from Schneider's, Workmen's Compensation Law, Vol. 2, Second Edition, §402, p. 1441 (Appellee's Br. 10), is based on cases from New Jersey, California and Maine, but not on decisions of the courts of New York.

It is, of course, necessary to examine the decisions of the Federal Courts and appellants have heretofore referred to (Appellants' Br. 13) *Hartford Accident & Indemnity Co. v. Hoage*, 85 F. (2d) 420 (Ct. App. Dist. of Col.) which case is cited by appellee (Appellee's Br. 11). The case of *Luckenbach Steamship Co. v. Norton*, 96 F. (2d) 764, 765 (C. C. A. 3) relied on by appellee (Appellee's Br. 15) is subject to similar criticism. It does not appear that the appellant in that case either called the court's attention to the binding force of the construction given to the New York statute by the courts of that state, nor to the authorities construing the same. The decision in that case rests entirely on decisions construing the New Jersey statute, apparently taken from 71 C. J. §583, p. 865, which contains no reference to the known and settled construction given to the New York statute.

It is contended by appellee that a different rule of construction should apply to the Act than to the Workmen's Compensation Law of the State of New York because under the latter statute (McKinney's Consolidated Laws of New York, Book 64, Workmen's Compensation Law, Sec. 123), the jurisdiction of the department is continuing (Appellee's Br. 24), whereas it is stated that under the Act the right of compensation might be barred by time limitation (Appellee's Br. 15, 24). This contention is predicated upon the provision of Sec. 13 (a) of the Act (Title 33 U. S. C. §913 (a)) providing that the right to compensation for disability shall be barred unless a claim therefor is filed within one year after the injury, and Sec. 22 of the Act (Title 33 U. S. C., §922, 48 Stat. 807), limiting the authority of the deputy commissioner to review a compensation case to "one year after date of the last payment of compensation" (Appellee's Br. 15, 16). In support of this contention appellee cites *Luckenbach Steamship Co. v. Norton*, 96 F. (2d) 764 (C. C. A. 3). The court in the language quoted by appellee (Appellee's Br. 17), states that:

> " * * * it would seem that an employer who has continued to pay the employee full wages has already paid him more than he could have been required to pay under the Act, and should not be required to pay more."

and then continues:

> " * * * . But, if, by merely paying an employee full wages during the one-year period of limitation for filing a claim for compensation, an employer could possibly escape liability to pay any com-

pensation thereafter, he would thus defeat the purpose of the Act."

The court does not answer the question as to whether this result would follow, but as stated above, decides that on the authority of cases other than those construing the New York statute that the payment of full wages is not a bar to the award of compensation. Inasmuch as this decision approves the rule of construction given by the New York courts, there should be no reason for failing to follow that construction unless some difference in the Act and the New York statute requires.

Sec. 12 of the Act (Title 33 U. S. C. §912), and Sec. 18 of the Workmen's Compensation Law of the State of New York both provide for a thirty-day notice of injury, the failure to give which, unless excused by the provisions of the respective sections, bars the right of claim. Sec. 13a of the Act (Title 33 U. S. C. §913a) referred to by appellee as barring right to compensation unless claim be filed within one year after the injury, also provides that such claim may be filed within one year after the date of the last payment of compensation. Although not identical in all respects, this section is similar to Sec. 28 of the Workmen's Compensation Law of the State of New York, as it existed at the time of the adoption of the Act, which similarly provided that the right to claim compensation is barred unless a claim be filed within one year after injury. See *Davis v. Rust*, 231 App. Div. 336, 247 N. Y. S. 309.

So far as the question here presented is concerned,

there is no difference between the Act and the Workmen's Compensation Law of the State of New York, due to the fact that under Sec. 123 of the latter the jurisdiction of the department is continuing, whereas under Sec. 22 of the Act (Title 33 U. S. C. §922, 48 Stat. 807), the deputy commissioner may only review an award prior to one year after the date of the last payment of compensation. By Sec. 14 (h) of the Act (Title 33 U. S. C. §914 (h)), it is provided:

> "The deputy commissioner (1) may upon his own initiative at any time in a case in which payments are being made without an award, and (2) shall in any case where right to compensation is controverted, or where payments of compensation have been stopped or suspended, upon receipt of notice from any person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been stopped or suspended, make such investigations, cause such medical examinations to be made, or hold such hearings, and take such further action as he considers will properly protect the rights of all parties."

This would empower the deputy commissioner to avoid any alleged power on the part of an unscrupulous employer to escape liability for compensation by first employing and thereafter discharging or otherwise failing to continue to pay to an injured employee wages at least equal to those received prior to injury.

It is submitted that there is no valid ground for distinguishing the New York statute and the Act so as to refuse to follow the known and settled construction of

ne former, which, as recognized in *Luckenbach Steamship Co. v. Norton*, 96 F. (2d) 764, (C. C. A. 3), is proper; or is there any valid ground for urging that such construction may result unfairly to an injured employee.

(b) There is no evidence to support the alleged decrease in wage-earning capacity.

In the brief of appellants it was argued that there is no evidence to support the alleged decrease in wage-earning capacity. The appellee attempts to meet this contention by citation of authorities referring to the difficulty in making such determination (Appellee's Br. 8, et seq.). Without reviewing the cases cited by appellee it is sufficient to say that appellants' contention here is that there is a total lack of evidence to support the finding of the appellee deputy commissioner and the appellee has failed to point out any evidence upon which the finding may be supported.

Respectfully submitted,

LAWRENCE BOGLE,
CASSIUS E. GATES,
EDWARD G. DOBRIN,
Solicitors for Appellants.

No. 8982

United States

Circuit Court of Appeals

For the Ninth Circuit.

HAZEL BRASHEAR, as administratrix of the estate of Earl Brashear, deceased, and on behalf of herself personally and on behalf of Richard Brashear and Gloria Brashear, her minor children,

Appellant,

vs.

UNION DREDGING COMPANY, a corporation, Former Owner of the Dredger "CARSON", Her Machinery, Tackle, Apparel, Furniture and Appurtenances,

Appellee.

Apostles on Appeal

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Southern Division of the United States District Court, in and for the Northern District of California.

No. 22399-R

In Admiralty

In the Matter of the Petition of UNION DREDGING COMPANY, a corporation, former owner of the dredger "Carson", her machinery, tackle, apparel, furniture and appurtenances, for limitation of and exemption from liability.

PETITION FOR LIMITATION OF AND EXEMPTION FROM LIABILITY.

To the Honorable, the Judges of the United States District Court in and for the Northern District of California, Southern Division:

The libel and petition of Union Dredging Company, a corporation, former owner of the dredger "Carson", her machinery, [1*] tackle, apparel, furniture and appurtenances, in a cause of limitation of and exemption from liability, civil and maritime, alleges as follows:

I.

That at all times herein mentioned, Union Dredging Company, a corporation, was and now is a corporation duly organized and existing under and by virtue of the laws of the State of California, and having its principal office and place of business in

*Page numbering appearing at the foot of page of original certified Transcript of Record.

the City and County of San Francisco, State of California.

II.

That at all times herein mentioned Union Dredging Company, a corporation, was the sole owner and operator of the dredger "Carson", her machinery, tackle, apparel, furniture and appurtenances; that said dredger "Carson" was not, at any of the times herein mentioned, or at any other time, a sea-going vessel.

III.

That on or about the 17th day of May, 1934, said dredger "Carson" was afloat in the navigable waters of San Francisco Bay, and was engaged in dredging operations near Hamilton Point, Marin County, California, in the course of a voyage which commenced on or about the 9th day of May, 1934, and which ended on or about the 28th day of May, 1934, at McNear's Point, in San Francisco Bay; that at all times on said day, and on and during said voyage, said dredger "Carson" was properly manned, equipped and supplied, and was in all respects staunch and seaworthy.

IV.

That on or about said 17th day of May, 1934, one Earl F. Brashear was employed upon the said dredger, which was [2] then afloat in the navigable waters of San Francisco Bay, in the course of the aforesaid dredging operations and voyage; that at the said time and place, the said Earl F. Brashear

jumped overboard from said dredger "Carson" and was drowned; that the death of said Earl F. Brashear was proximately caused by his own fault and carelessness and negligence and intentional act, in that said Earl F. Brashear negligently and carelessly failed to take reasonable or any precautions for his own safety, and intentionally jumped overboard from said dredger.

V.

That at the time the said Earl F. Brashear was drowned on or about the 17th day of May, 1934, and prior to and during the aforesaid voyage and dredging operations, said dredger "Carson" was in all respects seaworthy and in a thoroughly efficient state of hull, gear, and equipment, and was properly manned, equipped and supplied: that said Union Dredging Company, a corporation, used due diligence, prior to the commencement of the said voyage, and prior to the commencement of the said dredging operations, to make said dredger in all respects seaworthy and properly manned, equipped and supplied, and that the death of said Earl F. Brashear was due solely to his own carelessness, negligence, and fault, and because of risks assumed by him, and by reason of his own wilful and intentional act, and that said Union Dredging Company, a corporation, is not in any way accountable or responsible therefor.

VI.

That on or about the 17th day of May, 1934, and at the termination of the voyage heretofore referred

to, and at all times during the course of the said dredging operations, [3] the said dredger "Carson", together with her machinery, tackle, apparel, furniture, and appurtenances was of the value not to exceed the sum of $3375.00. That at the termination of the voyage heretofore referred to, there was no freight pending on said dredger "Carson".

VII.

That the death of said Earl F. Brashear was occasioned and occurred entirely without any fault or privity or knowledge on the part of said Union Dredging Company, a corporation, and without any fault or negligence on the part of any of its agents, servants or employees.

VIII.

That the following actions have been brought against your petitioner with respect to claims arising out of the said voyage;

An action at law in the Superior Court of the State of California, in and for the City and County of San Francisco, numbered 251994 therein, brought by Hazel Brashear for herself and on behalf of Richard Brashear and Gloria Brashear, her minor children, plaintiffs, against Union Dredging Company, a corporation, your petitioner, for the recovery of damages for the death of said Earl F. Brashear, wherein the plaintiff, Hazel Brashear, prays for damages in the sum of $25,000.00, the plaintiff Richard Brashear prays for damages in the sum of

$10,000.00, and the plaintiff Gloria Brashear prays for damages in the sum of $10,000.00 or $45,000.00 in all; that the names and addresses of the attorneys representing said plaintiffs in said action are Daniel W. Hone, Hone & Hone, Bertram Edises, Russ Building, San Francisco, California, and Derby, Sharp, Quinby & Tweedt, Merchants' Exchange Building, San Francisco, California;

An action at law in the Superior Court of the State [4] of California, in and for the City and County of San Francisco, numbered 265640, brought by Hazel Brashear, as administratrix of the Estate of Earl Brashear, deceased, plaintiff versus Union Dredging Company, a corporation, the petitioner herein, to recover damages for the death of said Earl Brashear, wherein Hazel Brashear prays for damages in the sum of $25,000.00, Richard Brashear prays for damages in the sum of $10,000.00, and Gloria Brashear prays for damages in the sum of $10,000.00 in all; that the names and addresses of the attorneys representing said plaintiff in said action are Hone & Hone, Russ Building, San Francisco, California, and Derby, Sharpe, Quinby & Tweedt, Merchants' Exchange Building, San Francisco, California;

That the amount of the damages claimed by said plaintiffs in said actions greatly exceeds the value of the said dredger "Carson", her machinery, tackle, apparel, furniture and appurtenances, together with her freight pending if any, at the termination of the voyage heretofore referred to.

X.

That *is* each of the aforesaid actions brought in the Superior Court of the State of California, in and for the City and County of San Francisco, petitioner herein, in addition to its defenses to said actions, petitioned the court for a limitation of liability under and by virtue of the law, and claimed the benefits of Sections 4283 to 4289 inclusive of the Revised Statutes of the United States, and the amendments thereto, and claimed that its liability should be limited to the value of petitioner's interest in said dredger "Carson", her machinery, tackle, apparel, furniture and appurtenances, together with her freight pending, if any, for the voyage upon which the death of said Earl Brashear occurred, alleging in support thereof, among [5] other things, that the Union Dredging Company, a corporation, your petitioner herein, was without fault or privity or knowledge in the premises, and that the amount of the claims and demands in each of said actions, greatly exceeded the value of the interest of your petitioner herein in said dredger "Carson", and her freight pending, if any, at the termination of the voyage heretofore described.

That in each of said actions brought in the Superior Court of the State of California, in and for the City and County of San Francisco as aforesaid, and prior to the time that said actions were set for trial, the plaintiffs in each of said actions raised the question of the right of petitioner herein to a limitation of liability, and denied, questioned,

contested and challenged the right of petitioner herein to limit its said liability as prayed for by your petitioner herein in said actions in said Superior Court, and as prayed for in this petition.

XI.

That your petitioner is desirous of contesting its liability and the liability of the said dredger "Carson" for the damages alleged to have been suffered by reason of the death of said Earl F. Brashear independent of the limitation of liability herein prayed for, and is also desirous to claim the benefits of the provisions of Section 4283 to 4289 inclusive of the Revised Statutes of the United States, and also hereby claims the benefit of the Limitation of Liability provided for in the Act of Congress of June 26, 1884, and particularly the benefit of the provisions of Section 18 of said Act, and also hereby claims the benefit of the Limitation of Liability provided for in Section 4289 of the Revised Statutes of the United States, as amended by the Act of June 19, 1886, and particularly Section 4 of the [6] last-mentioned Act, and also hereby claims the benefit of any and all acts of the United States, if any, whether named herein or not, amendatory or supplemental to the several sections and acts aforesaid, or any of them, and to any and all acts of the United States of America amendatory thereto; and by reason of the facts and circumstances hereinabove set forth, desires to contest its liability and the liability of the dredger "Carson", to any ex-

ent whatever, for any loss, damages for death, and injuries occasioned by or resulting from the matters and things herein alleged, or alleged in the said actions commenced in the Superior Court of the State of California, in and for the City and County of San Francisco, and desires an appraisement to be had of the amount of value of petitioner's interest in the said dredger "Carson", her machinery, tackle, apparel, furniture and appurtenances in the condition in which she was at the time the death of said Earl F. Brashear occurred, and at the time of the termination of the said voyage.

That said Union Dredging Company, a corporation, is entitled to have its liability in connection with or arising out of the aforesaid death and damages, if any, limited to the value of its interest in the said dredger "Carson", as the same existed at the time of the aforesaid death and the termination of the aforesaid voyage.

XII.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore petitioner prays that this Honorable Court will order due appraisement to be had of the value of said dredger "Carson", her machinery, tackle, apparel, furniture and [7] her freight pending, if any, together with the interest of petitioner therein, as the same was on the termination of the voyage on which said dredger "Carson"

was engaged at the time of the said death of Earl F. Brashear, and that a stipulation or undertaking may be given by your petitioner with surety conditioned for the payment into court of the appraised value of said dredger "Carson", her machinery, tackle, apparel, furniture and appurtenances, and her freight pending, if any, as the same existed at the termination of the voyage referred to herein whenever the same shall be ordered, and that this court will, upon the filing of such stipulation by petitioner, issue or cause to be issued, a monition against the said Hazel Brashear, as an individual and as administratrix of the Estate of Earl F. Brashear, deceased, and Richard Brashear and Gloria Brashear, and all other persons claiming damages or losses of your petitioner, Union Dredging Company, a corporation, and/or the dredger "Carson", by reason of injuries to persons or property occasioned by the facts heretofore alleged, citing them and each of them to appear before this court and there made due proof of their respective claims at a time to be therein named, as to all of which claims and damages your petitioner will contest its liability and the liability of the dredger "Carson", independently of the limitation of liability claimed under the statutes hereinbefore referred to. Petitioner further prays that this court will make an order directing that upon the giving of such stipulation as may be determined to be proper, or of an ad interim stipulation, that an injunction shall issue restraining the institution or

prosecution of any and all actions or suits against your petitioner herein, or against said dredger "Carson" in respect of such or any claim or claims founded [8] upon or arising from the death of said Earl F. Brashear, or the voyage heretofore referred to, and including said actions numbered 251994 and 265640 in the Superior Court of the State of California, in and for the City and County of San Francisco;

That this court may be pleased to determine that no liability exists upon the part of your petitioner for any act or thing done or occasioned by said dredger "Carson", her officers, crew, employees or agents, and particularly that no liability exists on the part of your petitioner, or the dredger "Carson", for damages alleged to have been suffered by reason of the death of said Earl F. Brashear or for any other act or thing done or occasioned by said dredger "Carson", her owners, officers, crew, agents or employees, on or during the voyage which commenced on the 9th day of May, 1934, and which ended at McNear's Point, in San Francisco Bay, on the 28th day of May, 1934;

That in case it should be found that any liability whatsoever exists on the part of your petitioner by reason of any loss, injury, damage, death or destruction, whether to person or to property, done, occasioned, incurred or in anywise arising out of or in connection with the said voyage as hereinbefore related, the Court shall adjudge that said liability shall not exceed the value of petitioner's interest

in said dredger "Carson", her machinery, tackle, apparel, furniture and appurtenances, and freight pending, if any, as the same existed at the termination of the voyage aforesaid, and that such amount be divided and pro-rated amongst such claimants as may prove their claims in accordance with law, and that a decree be [9] entered discharging petitioner from further liability in the premises;

That your petitioner may have and receive such other and further relief in the premises as may be just and equitable.

UNION DREDGING COMPANY,
a corporation,

(Signed) By EDW. F. HAAS
Its President.

(Signed) JAMES M. WALLACE

(Signed) REDMAN, ALEXANDER & BACON
Proctors for Petitioner.

(Verification)

[Endorsed] Filed Dec. 23, 1936. [10]

[Title of District Court and Cause.]

AD INTERIM STIPULATION.

Whereas Union Dredging Company, a corporation, former owner of the dredger "Carson", has instituted a proceeding in this court for limitation of and exemption from liability with respect to all claims arising out of a voyage of said vessel which

commenced on or about the 9th day of May, 1934, and which terminated at McNear's Point, San Francisco Bay, on or about the 28th day of May, 1934, and particularly certain claims for damages for the death of Earl F. Brashear on or about the 17th day of May, 1934, while said Earl F. Brashear was employed on board said dredger and which death is alleged to have resulted from negligence on the part of said Union Dredging Company, a corporation, while said dredger was on the voyage hereinabove referred to, all of which is more particularly set forth in plaintiff's petition herein filed on the 23rd day of December, 1934, in which petitioner prays, among other things, that the court will cause due appraisement to be made of the amount or value of the interest of said petitioner in said dredger, together with her machinery, tackle, apparel, furniture and appurtenances, and freight pending, if any, upon a reference to be ordered herein, and that an injunction issue restraining the prosecution of any and all actions, claims and proceedings resulting from or occasioned on the aforementioned voyage, and that a monition may issue to all persons claiming damages for injuries to person or property resulting from said accident or occurring during the aforementioned voyage, citing them to appear before the Commissioner to be appointed by this Court, and make due proof of their respective claims and to answer the petition herein, under and in pursuance

of the provisions of the monition [11] granted herein; and

Whereas said petitioner desires to prevent the further prosecution of all proceedings already instituted against said petitioner as owner of said dredger, and to prevent the commencement and/or prosecution hereafter of any and all suits, actions or legal proceedings of any nature whatsoever against petitioner arising by reason of the accidents and/or injuries and/or damages and/or losses occurring on or resulting from the aforementioned voyage, and also desires to provide an ad interim stipulation for value, as security for claimants pending the ascertainment by appraisement of the amount of the interest of petitioner in said dredger, together with her tackle, apparel, furniture, stores and equipment, and her pending freight, if any;

Now, Therefore, in consideration of the premises, the said petitioner, Union Dredging Company, a corporation, as principal, and Columbia Casualty Company, a corporation, duly organized and existing under and by virtue of the laws of the State of New York, having an office and place of business at 315 Montgomery Street, San Francisco, California, and duly licensed to transact a general surety business in the State of California, and in the Southern Division of the Northern District of California, as surety, hereby undertake in the sum of Three Thousand Three Hundred and Seventy-five Dollars ($3375.00), with interest at 6% per annum from the date hereof, together with costs,

that said petitioner will pay into court within ten (10) days after the entry of an order confirming the report of the appraiser to be appointed to appraise the amount or value of petitioner's interest in said dredger, together with her machinery, tackle, apparel, furniture and appurtenances, and her freight pending, for the voyage referred to in petitioner's petition, the amount or value of such amounts as thus ascertained, or will file in this proceed- [12] ing a bond or stipulation for value, with surety in said amount, and that pending payment into court of the amount or value of petitioner's interest in said dredger, together with her machinery, tackle, apparel, furniture and appurtenances, and her freight pending, if any, so ascertained, or the giving of a stipulation of value therefor, this stipulation shall stand as security for all claims in said limitation proceedings.

Said surety hereby submits itself to the jurisdiction of the court and agrees to abide by all orders of the court, interlocutory and final, and to pay the amount awarded by the final decree rendered by this court, or by an appellate court, if any appeal intervene, with interest at the rate of 6% per annum, unless the amount or value of petitioner's interest in said vessel, together with her tackle, apparel, furniture, stores and equipment, and her pending freight, shall be paid into court by the petitioner, or a stipulation for value therefor shall be given as aforesaid in the meantime, in which event this stipulation to be void.

The stipulators herein hereby consent that in the case of default or contumacy on the part of the principal or surety herein, execution to the amount named in this stipulation may issue against the goods, chattels, and lands of the stipulators hereto, and said surety alleges that it is worth double the amount of this stipulation over all its debts and liabilities. This recognizance shall be deemed and construed to contain the "express agreement" for summary judgment, and execution thereon, mentioned in Rule 34 of the District Court.

UNION DREDGING COMPANY,
a corporation,
By: EDW. F. HAAS
Its President
COLUMBIA CASUALTY COMPANY, a corporation,
[Seal] By: ERNEST W. SWINGLEY
Its Attorney-in-fact

Dated: San Francisco, California, December 22nd, 1936.

Approved:

MICHAEL J. ROCHE
District Court Judge [13]

(Two Acknowledgments)

[Endorsed]: Filed Dec. 23, 1936. [14]

[Title of District Court and Cause.]

ORDER OF REFERENCE FOR APPRAISAL.

It Appearing to this court that a petition for limitation of and exemption from liability has heretofore been filed herein by the above named petitioner, and application having been made for an order appointing an appraiser to make due appraisement of the value of the interest of petitioner in the dredger "Carson", together with her machinery, tackle, apparel, [15] furniture and appurtenances, and her freight pending, if any, as the same existed at the termination of the voyage mentioned in said petition for a limitation of and exemption from liability; and

Good cause therefor being shown

It Is Hereby Ordered that the above-entitled matter be, and the same is hereby referred to the Honorable Ernest E. Williams, United States Commissioner, for the purpose of making due appraisement of the value of the interest of petitioner herein in the dredger "Carson", her machinery, tackle, apparel, furniture and appurtenances, as the same existed immediately on the termination of the voyage referred to in said petition, together with the amount of freight then pending, if any, and upon making the said appraisement, that the same be forthwith reported to this court; and

It Is Further Ordered That at least three days' notice of the time and place of the making of such appraisement be given to Hazel Brashear, for herself and on behalf of Richard Brashear and Gloria Brashear, her minor children, and Hazel Brashear

as administratrix of the Estate of Earl Brashear, deceased, by delivery of such notice to their attorneys and proctors, Derby, Sharp, Quinby & Tweedt, at their office in the Merchant's Exchange Building, San Francisco, California or to Daniel W. Hone, or to Hone & Hone, or to Bertram Edises, in their offices in the Russ Building, San Francisco, California.

Dated: December 23rd, 1936.

(Signed) MICHAEL J. ROCHE
United States District Court
Judge.

[Endorsed]: Filed Dec. 23, 1936. [16]

[Title of District Court and Cause.]

Before: Hon. Ernest E. Williams, U. S. Commissioner.

TRANSCRIPT OF TESTIMONY TAKEN BEFORE COMMISSIONER.

Friday, March 26, 1937.

Counsel Appearing:

For Petitioner:
James M. Wallace, Esq.

For Claimants:
Joseph C. Sharp, Esq.

Mr. Wallace: This is a hearing on the appraisal of the dredger "Carson." Notice has been served upon claimants and I will call as the first witness Mr. Haas.

EDWARD F. HAAS,

Called for the Petitioner; Sworn.

Mr. Wallace: Q. Mr. Haas, are you an officer of the Union Dredging Company, the petitioner in this case?

A. Yes.

Q. What officer?

A. President and manager.

Q. How long have you been president of that company?

A. 1907, I think, it was incorporated.

Q. Now, referring to the dredger "Carson," was that owned by the Union Dredging Company in 1934, and sometime before that?

A. Yes.

Q. Are you familiar with that particular dredger?

A. Yes.

Q. Will you state, consulting any record that you may have if necessary, whether this dredger "Carson" was sold on or about [18] October 26, 1934?

A. Yes.

Mr. Wallace: I might say for the information of the Court that the accident to the decedent, whose

(Testimony of Edward F. Haas.)

heirs are represented by Mr. Sharp, here, occurred on May 28, 1934.

Q. To whom was that dredger "Carson" sold on that date?

A. The Olympian Dredging Company.

Q. Was there any bill of sale?

A. Yes.

Q. Have you a copy of the bill of sale with you?

A. Yes, I have it here.

Q. What was the consideration for the sale of that dredger on that date?

A. $3375.

Q. The date of that bill of sale is October 25, 1934, is it not?

A. Yes.

Mr. Sharp: May I see it, please?

Mr. Wallace: Yes. Have you any objection to offering that in evidence, without reading it in evidence, so that Mr. Haas may keep the copy of the bill of sale?

Mr. Sharp: This does not purport to be the original.

A. No, that is a copy of it.

Q. Where is the original?

A. The Olympian Dredging Company has it.

Q. Is it of record any place?

A. I don't know, it was up to them.

Q. I notice there are pencil notations on there. Do you know whether those pencil notations were on the original, or not?

(Testimony of Edward F. Haas.)

A. No.

Q. You don't know whether they were, or not?

A. No, I don't know. I turned it over to them. Here is a copy of the resolution passed authorizing that sale.

Mr. Wallace: If you have any objection to the reading of the copy in evidence I will ask Mr. Haas to testify to the facts. [19]

Mr. Sharp: I do not want to stipulate that is a copy of the original, because it shows pencil notations on it. I do not question Mr. Haas' sincerity in the silghtest, but, after all, with respect to the written document, never having seen the original, I would like to see it.

Mr. Wallace: Q. I would like you to state, using that copy of the bill of sale if necessary to refresh your recollection, whether or not that recites a consideration, and, if so, what consideration?

A. Well, it is $3375 for the whole thing, the dredger "Carson," together with an oil barge, a spare bucket, a rowboat, and all the equipment with it.

Q. Does it show to whom the dredger "Carson" was sold?

A. Yes, the Olympian Dredging Company.

Q. When did you first acquire the dredger "Carson", that is, when did the Union Dredging Company acquire it?

A. I think it was in 1907.

Q. In 1907?

(Testimony of Edward F. Haas.)

A. Yes.

Q. Do you recall the price that was paid for it at that time?

A. $20,000.

Q. Do you know how old the dredger "Carson" was when you bought it in 1907?

A. Well, it could not have been more than a year and a half old; it was built from machinery that had been designed for a gold dredger which was shipped to Carson, Neveda, many years before. Old Charles Warren had an idea he could get the job from the Santa Fe dredging China Basin, which, by the way, I got, myself, later on.

Mr. Sharp: Just a moment. Is the witness testifying from his own knowledge, or from things that he heard? If it is things that he heard I ask that it be stricken out as hearsay, and I would ask the witness to direct his answers simply to matters of his own knowldege. [20]

The Commissioner: Yes, of your own knowledge.

Mr. Sharp: I ask that what he heard from others be stricken out as hearsay.

Mr. Wallace: I am simply asking the witness what was paid in 1907.

A. $20,000.

The Commissioner: How old was the "Carson" at that time?

A. It had machinery that had been up in Carson.

Q. How old was it altogether?

(Testimony of Edward F. Haas.)

Mr. Sharp: Q. How old was the dredger?

A. I am telling you, probably a year or a year and a half old, the hull; the machinery was maybe ten years old.

Mr. Wallace: Q. Mr. Haas, did you write off any depreciation on the books of the Union Dredging Company with respect to this particular dredger "Carson"?

A. Yes, we did.

Q. Will you state, consulting your record there, at what amount you carried this dredger during the year 1934?

A. It was written down to about $1000, according to these records—$1021.

Q. $1021 as of what date?

A. It was carried at that figure from the first of the year.

Q. Of what year?

A. The year 1934.

Q. And up until what time?

A. Well, we usually depreciated it at the end of the year. That was from the beginning of 1934.

The Commissioner: Q. How much was that figure, again?

A. $1021.

Mr. Wallace: Q. Will you please state at what figure you carried this dredger in 1933?

A. That was at $1421.

Q. $1421?

(Testimony of Edward F. Haas.)

A. Yes. In January of that year, 1934, we lowered it $400.

Q. What did you carry that dredger at in the year 1932?

A. $1821. [21]

Q. It was $1821 for the year 1932?

A. Yes.

Q. Now, Mr. Haas, in making out the income tax returns for the Union Dredging Company did you use, among other figures, the valuation placed on that particular dredger?

A. Well, I do not quite understand the question.

Q. In estimating depreciation on the dredger, did you use those figures that you have just testified to in returns for income taxes?

A. Yes.

Q. Was that adhered to?

A. Yes.

Q. Was that the depreciation taken each year subsequent to 1932 and the years prior thereto?

A. It was taken right along from the beginning.

Q. Now, coming down to the year 1934, did you make any effort to sell this dredger "Carson" before negotiations with the Olympian Dredging Company?

A. Yes, I tried several times.

Q. With whom did you try?

A. I was talking to a gentleman named Gunderson, who had a fleet of dredges, I tried to interest him, and Gottschalk, who was representing the Dut-

(Testimony of Edward F. Haas.)

ton Dredging Company, made overtures to them for taking it over; business was getting to be pretty slack, and they were younger men, and I thought possibly they could find work for it.

Q. Had you been making money with this dredger during the year 1934?

A. Well, we made a good deal of money in the beginning.

Q. Well, during 1934.

A. No, I had unfortunate contracts in 1934 on which there was no profit made.

Q. With whom connected with the Olympian Dredging Company did you carry on negotiations for the sale of this dredger?

A. Fred Cooper.

Q. What officer is he of that company?

A. I think he is president, or at least he is manager of it. He is the principal owner. [22]

Q. What discussion did you have with him relative to the price, the sale price of this dredger?

A. I tried to get $5000 out of him, and he offered me $3000, and then I held out for $3500, and then he said, "I will split that and give you $3250," and I said, "No, I will split the difference between $3500 and $3250," and that is how we got the figure of $3375.

Q. At the time of that sale was the Union Dredging Company willing to sell that dredger?

A. Yes, they were glad to.

Q. Was the Olympian Dredging Company willing to buy it at that time?

(Testimony of Edward F. Haas.)

A. Yes.

Q. After those negotiations?

A. Yes.

Q. In your opinion would you say around $3375 was a fair and reasonable price at that particular time?

A. It is certainly all we could get, and I don't think they made anything out of it, because they had it laying idle for a period to within six months ago.

Q. Now, Mr. Haas, would you say that there was any difference in the value of that particular dredger on October 26, 1934, from its value on May 28, 1934?

A. I would say it would be about the same.

Q. About the same?

A. There was no depreciation taken off during that time.

Q. It was not worth more in October, 1934 than it had been in May?

A. No, there was nothing added to it.

Q. And that dredger was sold complete with all equipment?

A. Yes, the whole thing.

Mr. Wallace: You may cross-examine.

Cross-Examination.

Mr. Sharp: Q. Mr. Haas, 1934 was a bad year for you, was it not?

A. It so happened to be.

(Testimony of Edward F. Haas.)

Q. You were not interested in keeping the dredger for that [23] reason?

A. Oh, not at all. I got into two bad jobs. There were no other jobs at the time.

Q. You tried before you sold this dredger to the Olympian Dredging Company to sell it to several people?

A. Yes.

Q. And none of them had any use for a dredger like that?

A. That is right, and business was slack.

Q. As a matter of fact, even the people who bought it from you had no use for it until recently?

A. They bought it to get out of the road and get a job for it if they could.

Q. As a matter of fact, they did not put it to use until about six months ago?

A. They did not get a job.

Q. They could not get a job until about six months ago?

A. That is what I understand, that is hearsay, too.

Q. What size is this dredger, Mr. Haas, how long and how wide, and how deep?

A. She was almost 40 by 80, or 40 by 75, something like that.

Q. How deep was she?

A. About 8 feet.

Q. If I showed you what purports to be a picture of her would you be able to recognize her?

(Testimony of Edward F. Haas.)

A. Probably so.

Q. Is that a picture?

A. Yes.

Mr. Sharp: Might I ask that that be marked Claimant's Exhibit No. 1?

(The photograph was marked "Claimant's Exhibit 1.")

Mr. Wallace: Q. Is that as she was in October or May, 1934?

Mr. Sharp: Q. Does that picture show how she was approximately in May, 1934?

A. Where were these taken?

Q. They were taken up the river somewhere.

A. Recently?

Q. Recently.

A. Yes.

Mr. Sharp: I ask that this be marked Claimant's Exhibit 2.

(The photograph was marked "Claimant's Exhibit 2.")

Q. Here is what purports to be a picture of her showing the boom. [24] Is that a correct picture of her in 1934?

A. I think so.

Mr. Sharp: I ask that that be marked Claimant's Exhibit 3.

(The photograph was marked "Claimant's Exhibit 3.)

Q. Here is a picture of the boom and bucket. Is that a correct picture?

(Testimony of Edward F. Haas.)

A. It looks like it.

Mr. Sharp: I ask that that be marked Claimant's Exhibit No. 4.

(The photograph was marked "Claimant's Exhibit 4.")

Q. Here is one other. Is that a correct picture?

A. I suppose it is.

Mr. Sharp: I ask that that be marked Claimant's Exhibit 5.

(The photograph was marked "Claimant's Exhibit 5.")

Q. In 1934 was the dredge in good operating condition?

A. Yes.

Q. Fully equipped?

A. Yes.

Q. With all its machinery, spuds, booms?

A. Yes.

Q. What sort of houses were on the dredge?

A. Wood.

Q. How many decks?

A. Well, there was a main deck, a second deck, and then there was a shack built on top of those for the men to sleep in.

Q. How many men slept in it?

The Commissioner: That would be how many decks?

A. You might call it three decks, there was a housing built on.

(Testimony of Edward F. Haas.)

The Commissioner: By housing you mean what?

Mr. Sharp: The wooden structure of the hull.

Q. How long was the boom?

A. The length of the boom was about 115 feet, I think, something like that.

Q. It had a galley?

A. A kitchen?

Q. Yes.

A. Yes, a small kitchen, and dining-room.

Q. Anchor and moorings?

A. Yes.

Q. Was the hull in good preservation in 1934?

A. Not very good.

Q. Were there any leaks in the dredge?

A. Yes, it leaked pretty bad, the bottom was full of teredoes. [25]

Q. You did not have any trouble, however, in using it?

A. Yes, it needed caulking all right.

Q. Were the machinery and boilers in good condition?

A. Pretty fair, nothing extra.

Q. When she was in operation did she show any signs of strain?

A. I would say she did, she pulled the entire A frame loose over at Fort Mason during this period.

Q. But you repaired that?

A. Yes, we had to repair it.

Q. Did you carry insurance on her?

A. Yes.

(Testimony of Edward F. Haas.)

Q. Did you have her appraised for insurance?

Mr. Wallace: Just a moment, I will make the objection, if that question is directed at the insurance, it is immaterial, irrelevant, and incompetent, and I believe the court has heard argument on that identical point in other limitations and sustained the objection to valuation based upon an insurance policy.

Mr. Sharp: If your Honor please, none of these things are conclusive or determinative; there are many factors in determining value. When a man goes out and says that I want so much insurance on a boat, that is indicative in some measure of what he thinks the value is. It is not conclusive by any means. It is one of the elements which goes to give the court a true picture.

The Commissioner: I will let it in for what it is worth. As you say, it is not conclusive.

Mr. Sharp: It is not conclusive, but it is one of the elements that goes to give the Court a true picture.

Q. Did you in 1926 have an appraisal made?

Mr. Wallace: I object to any appraisal made in 1926 as being entirely immaterial. It is the year 1934 that we are dealing with.

Mr. Sharp: This is cross examination. I permitted counsel [26] on cross examination to go as far back as 1907, and it is for the purpose of testing the picture presented on direct examination.

(Testimony of Edward F. Haas.)

If he had not testified to 1907 perhaps I would have been limited.

The Commissioner: It will go in for what it is worth.

Mr. Wallace: It is too remote.

Mr. Sharp: So was 1907.

Q. Did you have an appraisal made in 1926?

A. I don't remember, I may have.

Q. Did you carry insurance in 1926?

A. Yes.

Q. How much insurance did you carry on the dredge in 1926?

A. I don't remember.

Q. Have you any way of ascertaining that?

A. I probably could by going over the record.

Mr. Sharp: I now demand that he produce the insurance policy made on the dredge "Carson" in the years 1926 to 1934, inclusive.

A. I probably could not do it, because those policies have all been thrown away.

Mr. Sharp: I have made a demand and you can make a search. If you cannot I believe we can.

Mr. Wallace: I suggest that you produce them, then.

A. I would rather you do it, then.

Mr. Sharp: Q. In 1927 did you have an insurance appraisal made?

A. Yes, I had it right along.

Q. Do you know what those figures were?

A. I could not give them to you off-hand.

(Testimony of Edward F. Haas.)

Q. Are you acquainted with similar dredgers in use on the Sacramento River?

A. More or less.

Q. Are there many dredgers of this type and size, in the last few years, in operation on the river?

A. Very few that I know of.

Q. This is an unusual size of dredger?

A. No, it was the usual [27] size at the time it was built.

Q. I am talking about the last few years.

A. The last few years, you mean was this an off-size?

A. An off-size in the last few years.

A. It is off-size in the fact that the present business is not suitable for it, that is why it did not have the value.

Q. It did not have the value because it was off-size?

A. Yes.

Q. As a matter of fact, dredgers of this type now being constructed are to be on a much larger scale?

A. Very much larger, or much smaller.

Q. But this size isn't being built?

A. I think there are none being built, as a matter of fact.

Q. None being built of this particular type?

A. Of any type.

(Testimony of Edward F. Haas.)

Q. As a matter of fact, this, what you call off-size of dredger, has not been built in the last dozen years?

A. No, not that I know of.

Q. As you say, one of the difficulties you had with the dredger was the fact that it was an off-size?

A. That is the reason it was a good price I got at the time I sold it.

Q. It was because of the fact that this dredger was a bit off-size that you had trouble in disposing of it at all?

A. It was not only that, but it was because the dredging business was slack; years ago there was a lot of reclamation work, and you would have to stand off friends. During the past depression there was a lot of work to do but the people would not do it, they did not have the money to do it, and besides what work there was to be done, some of it required a very much smaller dredge and some very much larger.

Q. As a matter of fact, in the last half a dozen years there has been no market for this type of dredger at all, has there?

A. Possibly not.

Q. The last half dozeen years there were no jobs for this type of [28] dredger?

A. There was a little.

Q. Do you know of any similar dredge sold in the last half dozen years?

(Testimony of Edward F. Haas.)

A. I think there was one, but I can't remember the date.

Q. You don't recall of any similar dredgers being sold actually in the last half dozen years?

A. I sold one to the Olympian Dredging Company.

Q. What year? Was it longer than six years ago?

A. Yes. I sold one for $5000, a $45,000 dredge for $5000.

Q. A $45,000 dredge?

A. Yes.

Q. When?

A. I can't remember.

Q. Over six years ago?

A. Yes.

Q. It cost you $45,000?

A. Yes, and I sold it for $5000.

Q. Since the year 1933 do you know of the sale of any dredger of this specific type?

A. I can't recall, I don't know of any, there might have been, but I don't know.

Q. You don't know of it?

A. No. The value that we kept on there, the depreciated value, was more or less fictitious, because we could have written it off entirely, with entire justification, so far as inventory was concerned, it being 27 years since we bought her.

Q. Whom did you buy her from?

(Testimony of Edward F. Haas.)

A. I bought her from the Warren Construction Company.

Q. Were they the people who built it?

A. Yes, old man Warren.

Q. Do you know what it cost them to built it?

A. No. I paid their price, I paid their asking price, there was not any bargaining about it, at all.

Q. This bill of sale, as far as you know, is identical with the original?

A. Yes.

Q. And it covers that certain clam shell dredger known as the Dredger "Carson" together with its oil barge, rowboat, and equip- [29] ment now situated at what is known as China Camp, in Marin County, just north of McNear's point, exclusive of any equipment located at other places. That is right?

A. Yes.

Q. It has in pencil the words "Spare bucket."

A. Yes.

Q. Do you know whether those pencil marks are on the original?

A. I don't know, probably they are.

Q. You don't know?

A. I don't know, but I would say probably they are.

Q. You don't know whether it is exactly the same or not?

A. I would say it was.

(Testimony of Edward F. Haas.)

Q. Are you the sole owner of the Union Dredging Company?

A. No.

Q. Are you the controlling owner?

A. Yes, I have been. We disincorporated the other day.

Q. Have you any idea of what it would cost to build a dredger like that to-day?

Mr. Wallace: If your Honor please, I object to that question on the ground it is immaterial, irrelevant, and incompetent, what the reproduction cost to-day would be of that dredger. We are fixing the value as of May, 1934.

Mr. Sharp: Mr. Wallace's objection may be well taken; it goes to the weight. However, in order to avoid any question, suppose I ask the witness if he has any idea what the reproduction cost of that dredger and equipment would have been in May, 1934.

Mr. Wallace: To which we will make the further objection that reproduction cost is immaterial, irrelevant, and incompetent.

The Commissioner: I will disregard anything that I think is not pertinent. I will allow it.

A. I have not any definite idea.

Mr. Sharp: Q. Have you seen the dredger lately?

A. No, I have not seen it since I sold her. [30]

Q. I have called your attention to these pictures, Exhibits 1 to 5, and asked you if she looks any

(Testimony of Edward F. Haas.)

different from those pictures, than she did in 1934.

A. She looks like the same old barn. You see the Charles Warren Company handled her and she looked like a barn. I was always ashamed of her.

Mr. Sharp: That is all.

Redirect Examination

Mr. Wallace: Q. Mr. Haas, referring to the pencil writing in the bill of sale, one of which is "Spare bucket," was the spare bucket in fact sold with the dredger and included in the sale price?

A. Yes.

Q. Were the other appurtenances included in the sale price?

A. Yes.

Q. You referred, Mr. Haas, to another dredger which you have purchased for I believe you said $45,000 and sold for $5000.

A. Yes.

Q. Do you know how old that dredger was?

A. I bought that dredger somewhere between 1900 and 1905.

Q. And it was sold when?

A. I am trying to recall. I can give you that information from my office.

Q. Can you approximate it, was it before 1930?

A. Oh, yes, it was before 1930.

Q. Was it about 1925?

A. It was about 1925, it might have been 1923.

Q. In other words, the dredge was approximately 20 or 22 years old at the time you sold it?

(Testimony of Edward F. Haas.)

A. Yes, something like that.

Q. You said also in answer to one of Mr. Sharp's questions that the dredger "Carson" could have been written off entirely, you having owned it for some 27 years. Upon what did you base that statement, what rate of depreciation?

A. Well, I think the most we ever took off any year was $100 a month, that was only $1200, and I see the last one we took off $400, and besides that we appreciated it once or twice when we made some repairs on it. [31] To be truthful, the depreciation was influenced by the amount of money that we put into it, but it was not excessive depreciation, that is the point I want to make. We never were criticized by anyone, and they examined our books.

Q. Do you know what the approximate life of a dredge of this kind is, that is to say, when it has ordinary usage?

A. I should say 20 or 25 years. That is a life which the income tax will accept. I have other equipment, one machine we bought here and paid over $40,000 for, and we have taken a seven years life and eight years life. All of those figures are based on a six, seven and eight-year life.

Q. You believe that 25 years would be a reasonable life for a dredger?

A. I certainly do.

Q. You said also that there was very little market in the year 1934 for dredgers. As a matter of

(Testimony of Edward F. Haas.)

fact, there were very few dredgers in existence, were there not, in this vicinity?

A. Sure; the cream of the dredger business was from 1907 on to say ten or fifteen years, there was a lot of reclamation going on.

Q. That is, from 1907 to 1917?

A. Yes, and more than that, there was a demand from 1907 to 1914, when you would have to stand off your friends, you could not supply them with a dredge, and then we were idle a number of times, six or eight months at a time, and getting but a few jobs.

Q. Was 1934 one of those slack periods?

A. Yes.

Q. Was 1933?

A. Yes, that was slack.

Q. Was 1932?

A. Yes, I should say so, generally.

Q. Have you any idea, Mr. Haas, how many dredgers there are in San Francisco Bay district, or how many there were, about 1934?

A. Of the same size as this?

Q. Of approximately the same type and size.

A. Well, of the [32] exact size, there were probably only three of four. Of the larger type, I could not count them on my fingers, twelve or fifteen—altogether I think there were 30 or 40.

Q. What were they?

(Testimony of Edward F. Haas.)

A. They are dredges which are used on the tide lot; you usually go in on the margin and float on water let in by the high tide.

Q. The "Carson" was not of that type, at all?

A. We did some work of that type, but it was not just the thing for it; with a smaller dredge you could work for a longer period. She drew too much water. At low tide she would go down to the ground, all of which detracted from her value.

Q. Are many of these dredges sold from one company to another?

A. A few of them, yes, not very many.

Q. Was that the situation in 1934?

A. Yes.

Recross Examination

Mr. Sharp: Q. How long have you been in the dredging business, Mr. Haas?

A. About thirty or forty years.

Q. You keep yourself acquainted with what has been going on in dredging during all of this period?

A. Very well.

Q. It was part of your job, being an operating manager of a dredge company, and you made it your business to know what similar companies were doing?

A. In a general way.

Q. You would know if there were dredgers in operation, being transported up and down around the vicinity?

A. I would hear about a job.

(Testimony of Edward F. Haas.)

Q. Whatever was going on in the dredging business you would eventually know about, wouldn't you?

A. Not necessarily, except that I came in contact with other dredgers.

Q. You kept track of other companies, knew what they were doing?

A. Fairly well.

Q. You would find out what work was available and what work you [33] could get?

A. Yes.

Q. The dredger business is competitive highly, is it not?

A. Not now, particularly.

Q. I mean during the last few years it has been?

A. No, not in particular.

Mr. Sharp: That is all.

The Commissioner: Let me ask you a few questions: In the housing part of the dredge there are accommodations, living accommodations?

A. Yes.

Q. How many men could you accommodate?

A. About ten.

Q. What horsepower did her engines have?

A. I think they were about 80.

Q. Do you know the type of engines?

A. No. I think they were built by the Golden State—the engines were built probably before 1900; they must have been at least pretty close to 40 years old.

(Testimony of Edward F. Haas.)

Mr. Wallace: Q. That is, the engines of the dredge?

A. Yes, the engines were up at Carson, that is how the dredger got its name, we called it the dredger "Carson". The whole thing had been laying up in Carson a good many years.

Q. You mean by that that the engines were about 40 years old at the time they were installed?

A. No, I would not say that.

Q. 40 years old at what time?

A. At the time I sold it.

Q. In 1934?

A. Yes. That is a guess.

Mr. Sharp: Q. That is your guess?

A. Yes. They certainly had been up in Carson seven or eight years before.

The Commissioner: Any other questions?

Mr. Wallace: Just one more question: The valuation which you testified to that appeared on your books, including the valuation of $1021 during the year 1934, those figures were the figures of this dredger as they appeared in the books then?

A. Yes. [34]

E. C. GENERAUX,

called for the Claimant; sworn.

Mr. Sharp: Q. Captain Generaux, what is your occupation?

A. Marine surveyor and appraiser.

(Testimony of E. C. Generaux.)

Q. How long have you been such?

A. 35 years.

Q. How long have you been in San Francisco as such?

A. About 17 years.

Q. Where else did you act as marine surveyor and appraiser?

A. Seattle and Portland.

Q. How many years in Portland?

A. Seven.

Q. How many years in Seattle?

A. Eleven.

Q. Do you hold any license from the United States Government?

A. Yes.

Q. What license?

A. Unlimited license, sail and steam.

Q. Have you ever done any work with respect to construction of vessels?

A. Yes.

Q. Where and how long?

A. Well, as part of my marine survey work.

Q. Have you ever been in charge of construction or repairs on dredgers?

A. I have been in charge of one dredger for about six months.

Q. In the course of your work as mariner surveyor and appraiser have you come in contact with dredgers in and around the Sacramento River?

A. Several of them.

(Testimony of E. C. Generaux.)

Q. How long have you been active as marine surveyor and appraiser up and down the San Francisco Bay and Sacramento River?

A. Since I have been here.

Q. Do you know the dredge "Carson"?

A. I do.

Q. Have you ever been on it?

A. I was.

Q. Under what circumstances?

A. For the purpose of appraising her for insurance companies.

Q. When did you first become acquainted with the "Carson"? [35]

A. In 1926.

Q. Did you go on board her and examine her hull, machinery and equipment at that time?

A. I did.

Q. When were you on her next?

A. About a year later.

Q. When were you on her next?

A. About a month ago.

Q. Can you tell the Court what kind of dredge it is, give an idea of its size?

A. It is 76 by 40, 8 feet in depth, hull built of wood, houses of wood, and the usual necessary equipment for a clam shell dredge.

Q. And how long a boom has she?

A. The last time I looked at her it was 110 feet.

Q. Do you know whether or not that is the same type of boom she had when you saw her earlier?

(Testimony of E. C. Generaux.)

A. I think at one time she had a little longer boom.

Q. What valuation did you place on the dredge in 1926?

A. $15,000.

Q. What valuation did you place on her in 1927?

A. $14,500.

Q. Basing your opinion on your knowledge of the dredge, and your personal observation, what valuation would you place upon the dredge in May, 1934?

A. $9500.

Q. What would have been the reproduction new cost of that dredge in 1934?

Mr. Wallace: We will make the same objection for the purpose of the record, if your Honor please, as immaterial, irrelevant and incompetent, what the reproduction cost would be at that time.

The Commissioner: That is true, but I will allow it.

A. I will say approximately the reproduction cost would be at least $60,000, probably $65,000.

Mr. Sharp: Q. You say you fixed a value of $9500 in May, 1934?

A. Yes.

Q. Do you consider that a fair and reasonable value for a dredge [36] exactly like that in May, 1934?

A. I do.

(Testimony of E. C. Generaux.)

Q. Taking the reproduction value that you testified to, and allowing reasonable depreciation, what value would you get for the dredge in May, 1934?

Mr. Wallace: We will object to that, if your Honor please, as ambiguous.

The Commissioner: Yes, I do not understand that question.

Mr. Sharp: I will reframe the question, and withdraw that.

Q. When you say it had a reproduction value of $65,000 in May of 1934 what do you mean by that? That is what I am trying to get at.

A. Reconstructing a new dredge and full equipment in 1934, my estimate is it would cost approximately that figure.

Q. Do you know the condition that that dredge was actually in in May, 1934?

A. I do not.

Q. When you saw the dredge last was she in the same or different condition then than she was when you saw her in 1927?

A. Well, she showed slight deterioration, she showed quite a few renewals and repairs to hull.

Q. How recent were those renewals so far as you could tell from your observation.

A. Well, there were several planks there that had been put in in renewal, otherwise might have been a year or two back.

Q. Now, when you saw the dredge last in what condition was her hull and booms?

(Testimony of E. C. Generaux.)

A. They were in generally fair condition.

Q. Did you make any examination to see whethe there were any leaks from the outside?

A. I went through the interior of the hull.

Q. What was its condition?

A. There was very little water in her, I did no notice any water coming in through the beams There was water coming around the deck openings

Q. Was her machinery and boilers in good working order? [37]

A. All functioned properly.

Q. Were they in any different condition than when you saw them last before that?

A. They did not appear to be.

Q. Did you see it operated when you saw it recently?

A. Yes.

Q. Did she show any signs of strain when she was operated?

A. No.

Q. Did she operate any differently than when you saw her last before that?

A. The time previous to that she was not operated, she was tied up. This is the first time I saw her operating.

Q. Did you make any inquiries to ascertain whether there were any sales of this type of dredger during the year 1934?

A. I made as much inquiry as I could.

(Testimony of E. C. Generaux.)

Mr. Wallace: We will object to anything that he might have heard as being hearsay.

The Commissioner: Yes, that is true.

Mr. Sharp: Q. I will ask you, do you know of any sales of this type and size of dredger in the year 1934?

A. I do not.

Q. Did you make inquiry to find out whether there were any sales of this type?

A. I did.

Q. Is this type and size of dredger usual or customary in San Francisco or vicinity and the Sacramento River?

A. Well, not in San Francisco so much as it has been up in the river country. There are several types, I mean sizes, some smaller, some this size, and some larger.

Q. Do you know as a matter of fact whether or not insurance was placed on the basis of your appraisal?

A. I could not answer that, Mr. Sharp, I don't know. I was just requested to make a survey and submit a valuation for insurance purposes.

Mr. Sharp: If your Honor please, we will ask Mr. Haas to come back with these insurance policies.

Mr. Wallace: We will certainly try to find them.

Mr. Sharp: If you cannot I will have to get them

(Testimony of E. C. Generaux.)

from the [38] insurance company records. I do not want to have to do that.

Mr. Wallace: I take the position that they are not admissible, and this Court has at previous hearings ruled out such policies.

Mr. Sharp: We have here a situation unusual in character, and anything that will help out the Court we want to put in.

The Commission: You, gentlemen, ought to be able to get that information.

Mr. Wallace: I shall endeavor to, but, on the other hand, I do not want to be in a position of stipulating that that is proper evidence.

Mr. Sharp: I am not asking you to do that, but I would like to have those insurance policies. That is all.

Cross Examination

Mr. Wallace: Q. Captain Generaux, for what insurance company did you make these appraisals in 1926 and 1927?

A. I believe it was for the Insurance Company of North America.

Q. Do you remember the man's name?

A. Mr. Hanna, of the Marine Department.

Q. You think it was the Insurance Company of North America?

A. I think it was.

Q. When you went aboard the "Carson" in 1926 where was she?

A. I think she was over in San Rafael.

(Testimony of E. C. Generaux.)

Q. Did you know at that time, 1926, she was nineteen years old?

A. Yes.

Q. You knew that?

A. Yes.

Q. I notice that in 1926 for insurance purposes you appraised this dredge at $15,000 and 1927 at $14,500, and in 1934, although you did not examine the dredge at that time, you state in your opinion it would have been worth an appraisal for insurance purposes of $9500; is that correct?

A. Yes.

Q. Do you follow any scale of depreciation there in giving those [39] figures?

A. There is no rule followed as to direct scale to reach that figure. It depends a good deal on the condition of the property.

Q. Why did you take off $500 between the years 1926 and 1927?

A. Because there was no appreciable deterioration in the period of a year in any dredge; it was my opinion that was approximately $500.

Q. Did you know that the price of that vessel in 1907 had been $20,000.

A. I did not.

Q. You did not?

A. No.

Q. Then, using your figure of $15,000 in 1926, 19 years later, you did not take into consideration the fact that the dredger had cost $20,000, at all?

(Testimony of E. C. Generaux.)

A. Was that the cost, or was that a purchase?

Q. A purchase. Did you at that time, that is at the time you made the appraisal in 1926 for insurance purposes, know what the construction cost of that dredge had been?

A. I did not from any records, no.

Q. Did you know where it had been built?

A. I did not.

Q. Did you know that the engines and machinery had been constructed many years before they were installed on the dredge?

A. No, I heard that the machinery was not built directly for the dredge, but that the machinery was in good general condition and fit and suitable for operations on this particular dredge.

Q. Did you know in 1926 that that machinery was probably 25 years old at the time?

A. I did, I was well aware of it.

Q. How did you reach the figure of $9500 as of 1934, at which time you stated you did not actually examine the dredge? How did you arrive at that figure of $9500?

A. I based that on the 1927 valuation until this period when I saw the dredge a month ago and made my figures for 1934. [40]

Q. What figures did you use for 1937 as the valuation for insurance purposes of that dredge?

A. 1937?

Q. Yes, about a month ago.

A. I would put a valuation of around $7500 for insurance purposes.

(Testimony of E. C. Generaux.)

Q. For insurance purposes around $7500?

A. That would be what I would call the insurance value.

Q. You do not wish to state that that testimony as to value relates to market value, do you?

A. Well, market value is, of course, controlled by demand.

Q. By demand and supply, that is true?

A. Yes.

Q. And you would estimate that value for her was for the purpose of placing insurance on the dredge?

A. In my opinion, what the value was to an owner or the insurance company.

Q. Were these values that you have specified here values that the dredger would bring by sale in an open market, in your opinion?

A. It all depends on conditions at the time.

Q. I believe you have already stated that your market value is determined upon supply and demand?

A. Yes.

Q. When you made your examination at any of these times did you at any time bore the bottom planks?

A. I used an instrument that I call a pricker.

Q. How deep does it go into the planks?

A. It all depends on the condition of the wood, a quarter of an inch, half an inch. Most of my examination is by that system.

(Testimony of E. C. Generaux.)

Q. When did you make that examination?

A. The last time I was up there.

Q. Would you say that the planks were in good condition at that time?

A. They were generally in fair condition.

Q. You did not make such an examination by boring the planks during the examination in 1926 and 1927?

A. No, I used the same method. [41]

Q. You used the same method?

A. The same method, yes.

Q. Now, referring to the bottom planks particularly, did you bore them?

A. That would not be in order, to bore the bottom planks while the vessel was afloat. It could be done if you got the authority, but I would not assume it.

Q. And you did not, in fact, do it?

A. No, I just used my pricker.

The Commissioner: Did you bore the sides?

A. I did not. You can prick a plank and then you can sound it and tell whether it is sound.

Q. What is a picker?

A. It is like an ice pick.

Q. How do you sound it?

A. You sound it like a hammer, you prick into the wood and prick in the seam, and you get in a seam and shove up through the planking.

Q. And then you sound it?

A. You sound it and can tell whether it is sound timber.

(Testimony of E. C. Generaux.)

Q. What did you prick it for? Couldn't you sound it without pricking?

A. Sometimes you get into a spot, maybe you get inside of something, but from years of experience your eye will almost tell you what the condition of a plank is.

Mr. Wallace: Q. Captain Generaux, you said that there had been some renewals of planks made when you made the examination in 1937 from its condition in 1927?

A. Yes.

Q. In other words, there was an interval of ten years between 1927 and 1937 that you had not seen the dredger at all, is that correct?

A. Yes.

Q. And there had been some renewal of planks made?

A. Yes.

Q. What renewals had been made?

A. Some on the sides, and one or two in the bow.

Q. Do you know which of those renewals were made after 1934 and which were made before?

A. No, I would not say. You could [42] tell by the planking, itself, whether it was an original plank.

Q. But you could not tell when it had been renewed?

A. You could tell within a year or two when it had been put in.

Q. You could not tell whether they had been renewed more than once?

(Testimony of E. C. Generaux.)

A. No, you could not tell.

Q. You don't know what renewals or replacements of machinery or parts were made between 1927 and when you examined her in 1937, when you next examined her?

A. No. I did not go that far into the machinery, because in my examination of the machinery I found it functioned properly and was doing its regular work.

Q. This is all a wooden dredge, except the machinery in it?

A. Yes.

Q. You have testified in other cases, have you not, Captain, for myself and Mr. Black, with respect to values of wooden vessels, and is it not a fact, Captain, that it is proper in the case of a wooden vessel to write off depreciation of approximately 5 per cent. per year?

A. No, I think that was the situation years and years ago. It has become obsolete from the fact that depreciation depends on the condition of the property. If it is well kept up, they have got dredgers fifty years old still operating; if you let them go they are obsolete in twenty years.

Q. Is it not a common rule used in connection with appraising vessels to take 5 per cent. depreciation per year on wooden vessels?

A. That is based on seagoing property, for the simple reason that they anticipate after twenty years that the vessel becomes obsolete, so they write her off in twenty years.

(Testimony of E. C. Generaux.)

Q. In other words, you have testified in other cases of limitation of liability that with reference to seagoing wooden vessels the vessel is written off in twenty years?

A. It is written off as far as the value is concerned for sea. [43]

Q. This dredge in 1934 was 27 years old, was it not?

A. Yes.

Q. Have you any copies of the report that you made to the Insurance Company of North America on the appraisal?

A. I would have to look at my records to see.

Q. Where did you get the figures that you testified to today of $15,000 and $14,500?

A. From my records.

Q. Where are those records?

A. From my notes. There are a lot of my survey reports that I boxed up and took home.

Mr. Wallace: I will ask the witness to produce all of the records that he has relative to the appraisal that he made in 1926 or 1927.

Mr. Sharp: We have no objection to the witness producing everything he has.

Mr. Wallace: Together with any copies of correspondence that he had with the Insurance Company of North America.

Mr. Sharp: He will produce everything that he has.

A. That is, if it is that company.

(Testimony of E. C. Generaux.)

Mr. Sharp: Anything that Mr. Wallace wants produced we are both willing to have brought out to Court, no matter what it is.

Mr. Wallace: Q. Did you find any teredoes in the bottom planks of the dredger at any time when you made these inspections?

A. I would not look for teredoes. The dredger's time is mostly spent in fresh water.

Mr. Wallace: That is all.

Redirect Examination

Mr. Sharp: Q. Captain Generaux, I understood on cross-examination you stated that in your experience some of these dredgers last twenty to fifty years, and are actually in operation?

A. Yes, there are dredgers that are in existence.

Q. Where depreciation is figured at a certain percentage per year, [44] is it taken on the original cost, or on the reduced cost each year?

A. After the first year we generally write off 5 per cent., and that is deducted; for instance, you have a property value——

Q. Assuming a value of $60,000 in this case originally, you take off 5 per cent., which would give you a residual value at the end of the first year of $57,000?

A. Yes.

Q. Then assuming a residual value of $57,000 at the end of the first year, how would you figure the depreciation on the second year?

(Testimony of E. C. Generaux.)

A. 5 per cent. off of that.

Q. 5 per cent. off of $60,000, or $57,000?

A. Off of $57,000, because that is her value then.

Q. Would you prepare and furnish to the Court a table showing the value in 1934 upon a depreciation based at 5 per cent. a year, 4 per cent., and 3 per cent. per year, and 2 per cent. a year, and have them available here at the next hearing of this case?

A. I will.

Mr. Wallace: Upon what value?

Mr. Sharp: What, in your opinion, was the reproduction value of the dredge in May, 1934?

Mr. Wallace: We will object to that.

The Commissioner: He has already testified to that.

Mr. Sharp: On the basis of the figure that you gave of $60,000 and $65,000, marking one $60,000 and one $65,000, and assuming the vessel was built in 1906. Will you have those tables prepared for the next hearing?

A. Yes.

Mr. Wallace: Of course, I shall object to this. I have no objection to preparing a table based on the valuation of $20,000, which was the actual cost of that vessel in 1906, but I certainly will object to any table showing the depreciation starting with $60,000, which is the reproduction estimate that he has given for [45] 1934.

The Commissioner: He can figure it out and introduce it, and you can make your objection.

EDWARD F. HAAS,

recalled for the Petitioner.

Mr. Wallace: Q. Mr. Haas, were the bottom planks of the dredger "Carson" ever bored under your direction or in your presence?

A. Yes, some years ago, I could not tell you how long, but before I sold her, I found teredoes in the bottom of the dredge, and I employed Professor Kofoid to come over and see what I could do about it; we had it planked underneath, and some of these planks ripped off, and we found by boring a hole through the bottom that the planks were eate*d* by teredo, honeycombed by teredo, four-inch planks had only about an inch left of sound wood. The rest were eate*d* by teredoes. Mr. Generaux said that he did not examine them because the dredger had been used in fresh water. That is not true. The "Carson" spent a great deal of her life in salt water, more so than any of the other dredgers.

Cross Examination

Mr. Sharp: Q. When did you last see the dredger, Mr. Haas?

A. I have not seen her since I sold her, but I am telling you that, before I sold her, before this all happened, I am telling you she was full of teredoes.

Q. As a matter of fact, the Olympian Dredging Company took her into fresh water?

A. I am not sure.

(Testimony of Edward F. Haas.)

The Commissioner: Q. What did you do with the planks?

A. I took a chance on what was left.

Q. You did not replace them?

A. No, it would cost too much to replace them, but I am telling you that the bottom had deter- [46] iorated, and if it had rested on anything like a sharp rock it would have gone through.

Mr. Sharp: Q. You say that at the time you sold the dredge the planks on the bottom were worm-eaten and very thin?

A. Yes, and there were places in there where we bored that the teredoes had eaten in several inches.

Q. Did you call the attention of this to the people you sold to?

A. No.

Mr. Wallace: I object to that as immaterial, irrelevant, and incompetent.

The Commissioner: He said no before you had a chance to object.

A. She is still afloat, but the value was not there.

Mr. Sharp: She is still afloat and had no trouble?

A. No, but if they landed on anything sharp there would be trouble.

(Thereupon, by consent, an adjournment was taken until Friday, April 2, 1937, at 2:15 o'clock p. m.)

[Endorsed]: Filed Jul. 21, 1937. [47]

FRIDAY, APRIL 2, 1937.

Mr. Sharp: If your Honor please, at the time of the last hearing there were demands on both sides for certain documents. So far as the demands made with respect to us, I am informed that the witness, Mr. Genereaux, has examined the files for the survey reports made in 1926 and 1927, and I will offer them in evidence, after asking a few preliminary questions with respect to them.

The Commissioner: Very well.

E. C. GENERAUX,

recalled.

Mr. Sharp: Q. Captain Generaux, at the last session you were requested by Mr. Wallace to make a search for the survey papers in connection with your examinations in 1926 and 1927. Have you made such a search?

A. I have.

Q. Have you found those surveys?

A. I did.

Q. Were you also able to refresh your memory as to who was responsible for causing you to make the valuations in those years?

A. I was.

Q. Who did you make such valuations for?

A. Mr. Haas.

Q. The gentleman who testified here at the last hearing?

A. Yes.

(Testimony of E. C. Generaux.)

Q. Who paid for your services in connection therewith?

A. The company that Mr. Haas was president of.

Q. Which company?

A. The Union Dredging Company.

Q. Did you acknowledge receipt of the money from the Union Dredging Company by way of a letter?

A. I did.

Q. The original letter, of course, was sent to the Union Dredging Company?

A. Yes.

Q. Have you a carbon copy of that letter?

A. I have. [48]

Mr. Sharp: I offer this in evidence and ask that it be copied into the record.

Mr. Wallace: I wish the record to show that I renew the objection we made at the previous hearing to any evidence with respect to a valuation placed on this dredger for insurance purposes, on the ground that any such valuation is immaterial, irrelevant, and incompetent.

Mr. Sharp: Our point at the last hearing was that these matters all go to the weight of the testimony.

The Commissioner: Yes, it goes to the weight. I will allow it.

(The letter is as follows:)

"October 13, 1926.

"Union Dredging Co., Inc.,
Merchants Exchange Building,
San Francisco, California.

(Testimony of E. C. Generaux.)

"Gentlemen:

"This will acknowledge and thank you for your check in the amount of $25.00, to cover our invoice of September 28th, 1926, for services rendered in connection with Clam Dredge 'Venice' and also Clam Dredge 'Carson.'

"Very truly yours,
GENEREAUX & HEPPELL
E. C. GENEREAUX
Marine Surveyors."

Mr. Sharp: Q. Have you carbon copies of the survey reports made by you at that time and sent to Mr. Haas?

A. I have.

Q. The originals were delivered by you to Mr. Haas?

A. Yes.

Q. These are carbon copies of those delivered to Mr. Haas by you?

A. Yes.

Mr. Sharp: I ask that these be copied into the record.

Mr. Wallace: We wish the record to show the same objection we made before. As I understand it, the reporter will copy [49] these into the record?

Mr. Sharp: Yes. We demand all of his papers in regard to the appraisal, and he said he did not know if he had any. These are really secondary evidence of valuation which should be in Mr. Haas' possession.

(Testimony of E. C. Generaux.)

(The documents are as follows:)

"46-2

"CLAM DREDGE 'CARSON'

"At the request of the Union Dredging Company, Inc., (Mr. Haas), Merchants Exchange Building, San Francisco, we are requested to hold survey on this dredge, lying afloat in San Rafeal Slouth, California.

"Purpose of survey, to ascertain condition and value.

"Dimensions — Length 76′— Breadth 40′— Depth 8′. Built—1906

"From records examined we find that dredge was lifted on dry dock in 1925 at the Moore Ship Yards, Oakland, California. Hull was given a general overhaul, timbers examined and renewed where required and caulking thoroughly gone over. All soft decking removed, renewed and caulked. Hardwood beds fitted under A frame.

"Made an examination of hull throughout and found all timbers sound and no water in bilges.

"Engine, auxiliaries, pumps etc. found in apparent good condition, all showing good care.

"Boiler was opened and found clean with tubes free from scale.

"Captain Forsyth has had charge of this dredge since 1910.

(Testimony of E. C. Generaux.)

"It is my opinion that the general condition of dredge is good and that her machinery and tackle is in good working condition for operation. Owners are preparing to install a water tank on upper house with pipe leads to fire plugs. Tank capacity about [50] 1500 gallons.

"Consider the moral hazard good and appraise dredge as of September 28th, 1926 to be $15,000.00.

September 28th, 1926.

GENEREAUX & HEPPELL
E. C. GENEREAUX."

"46-3

"CLAM DREDGE 'CARSON'

"At the request of the Union Dredging Company, Inc., (Mr. Haas), Merchants Exchange Building, San Francisco, we were requested to hold survey on this dredge moored to beach in upper end of Richmond inner harbor.

"Survey requested to ascertain her general condition, up-keep and value.

"This dredge is—76'—Length.
40'—Breadth.
8'—Depth.

Built in 1906

"We made a careful examination of hull, machinery and equipment, and find that hull

(Testimony of E. C. Generaux.)

has been recently hauled on the beach and repairs made in way of after spud.

"Interior of hull disclosed that timbers were sound and that the bilges then were in a process of being thoroughly cleaned of all refuse and oils.

"General examination of main engine, auxiliaries, pumps, etc., from general inspection, were in good condition.

"Boiler was recently opened up and thoroughly cleaned, having passed general inspection June 1st, 1927.

"Fire equipment consists of 1—750 gallon tank, situated on the top of the house, with pipe lines leading to various parts of dredge, with proper hose attachments.

"A small gasoline engine is equipped for emergency pumping, if necessary.

"Two (2) inverted fire extinguishers have recently been re- [51] filled. These are situated in engine room and accessible.

"New Pyrene fitted in galley.

"Examined stove and piping in galley and found same in order. Donkey boiler stack has ample clearance, and deck entrance properly protected.

"Dredge is free from outside fire hazard in her present location.

"Captain Forsyth has been in charge of this dredge for seventeen (17) years, and is stationed aboard.

(Testimony of E. C. Generaux.)

"After due consideration, would appraise the dredge as of August 12, 1927, to be—Fourteen Thousand Five Hundred Dollars ($14,500.00).

"Consider the moral hazard good.

"GENEREAUX & HEPPELL,
E. C. GENEREAUX,
Marine Surveyors.

August 12th, 1927."

Q. Captain Generaux, in your opinion how much actual life in full operation is left in the dredge "Carson"?

A. In the dredge "Carson" I should say ten years.

Q. So that, in your opinion, the actual life of that dredge, considering that it is now about 30 years old, is in fact 40 years?

A. 40 years.

Q. That is based on actual observation and not upon a hypothetical case as to what its actual life would be?

A. From actual observation.

Q. Are depreciation figures based upon actual experience, or upon hypothetical assumptions?

A. Upon actual experience.

Q. When a boat is actually built you are not in a position to say how long it is going to live, are you?

Testimony of E. C. Generaux.)

A. No, you consider in taking off depreciation, s the years go by, it depends a good deal upon the ondition, it depends on your upkeep.

Q. When you start in taking your depreciation, mean at the begin- [52] ning of a period, that is urely a theoretical guess as to what its life might e?

A. That is true.

Q. At the last hearing I asked you to prepare ables showing what the depreciated value of a lredge would be on the basis of reproduction cost iew of $60,000 or $65,000, basing the depreciation it various rates, such as 5 per cent., 4 per cent., 3 per cent., 2 per cent. Have you prepared such a statement?

A. I have.

Q. Is this the table?

A. Yes.

Mr. Sharp: I ask that it be copied into the record.

Mr. Wallace: To which we object on the ground it is clearly inadmissible. Apparently, that table is based upon a valuation of $60,000 or $65,000 reproduction cost, which this witness testified would be the reproduction cost to-day of that dredge. On the further ground that there is nothing in the record to show that in any event would be the valuation to be considered here, which is the market value of this dredge.

Mr. Sharp: If your Honor will permit a word at this time with respect to that, we intend to brief,

(Testimony of E. C. Generaux.)

for your Honor's convenience, if your Honor will permit, the law on the question, and we wish to have evidence in the record which will enable us to present the various decisions which we believe control the situation. As I understand the situation, the value of a barge or a boat, or any other article at a given time depends upon its market value, if there is one. In this case we believe we have shown by the testimony of both the witnesses who have testified that this was an off-size dredge, and that there were no sales of similar dredges for a period of years, with respect to the time at which we are trying to fix the value. Under the circumstances, the cases are uniform that the proper theory of value that the courts have said is the reproduction cost new less depreci- [53] ation, and we have had cases before your Honor and before this Court in which that rule has been followed in cases of river craft such as the one before us. Now, in order to present that theory we wish to offer the evidence which will aid your Honor in figuring this thing out. As a matter of fact, your Honor could make your own figures, yourself; there is no magic in taking a $60,000 figure and depreciating it at different rates of interest. It is something of which you could take judicial notice. But for your Honor's convenience we have had these tables prepared. The record shows that this witness testified that at the time of this accident the reproduction cost new of this dredge would have been $60,000 or $65,000.

Testimony of E. C. Generaux.)

Now, in order to figure the depreciation you have to get a rate, the rate may be 5 per cent., it may be 4 per cent., it may be 3 per cent., or even 2 per cent., depending upon the life of the dredge. If this dredge had a 15-year life, as some dredges of this type, of course, for such a life your rate might be 2 or 3 per cent.; if it has a 20-year life your rate might be 4 or 5 per cent. As to which is proper is a matter of argument, but in order to give your Honor the choice of accepting one figure or the other we are presenting for your convenience these tables.

The Commissioner: Are these tables based upon 5 per cent. per year?

Mr. Sharp: 5 per cent. depreciated value.

The Commissioner: $60,000, and the next year it would be 5 per cent., on the remainder?

Mr. Sharp: Yes, 5 per cent. upon the remainder, and so on. If you figured at 5 per cent. you would get a value in 1934 of $14,370 upon a $60,000 reproduction cost, and $16,522 on a $65,000 cost. We hope to be able to present to your Honor rulings of Income Tax Bureaus, or other Bureaus as to which [54] would be a proper rate.

The Commissioner: It may go in.

Mr. Wallace: I might say this, even though you assume that what counsel says is so, the fact remains that in this case there is a market value, because this very dredge was sold on an open market; in other words, we have a market value, and,

(Testimony of E. C. Generaux.)

therefore, there is no need of having any computation as to depreciation of a fictitious reproduction value.

Mr. Sharp: The evidence in this case shows that sale was not a fair price. One sale would not make a market, any more than one swallow makes a summer. There is the testimony of Mr. Haas that at the time of this sale they had a very unusual situation, they were in the middle of the depression, there was a slack period during the depression, there was no use for a dredger of this sort, it could not have been used. The company which bought it could not find any use for it for years after it bought it, and when a man sells something for which there is no demand and for which there is not any market then there is not any market price. We believe we will be able to demonstrate to your Honor that one sale under forced unusual, uniqué, not the customary circumstances can no more make a market than, as I said, one swallow makes a summer.

Mr. Wallace: The fact is that market value is determined by the economic conditions that exist at the time of the sale. If you had a general condition or specific condition with reference to this dredger which affected the market value at a certain time, that is exactly what determines the market value of this dredge.

Mr. Sharp: If that were the situation all of this

(Testimony of E. C. Generaux.)

myriad of cases which apply the rule of reproduction less depreciation would have been otherwise.

[55]

Mr. Wallace: There was no sale in that case.

The Commissioner: That is a matter for me to decide. I will allow this to be copied into the record.

(The tables are as follows:)

"Depreciation at 5% per Year.

Original Value—$60,000.00—1906	$65,000.00
5 years— 46,386.00—1912	50,297.00
10 years— 34,234.00—1917	39,498.00
15 years— 26,485.00—1922	30,564.00
20 years— 20,576.00—1927	23,650.00
25 " — 15,922.00—1932	18,318.00
27 " — 14,370.00—1934	16,522.00
30 " — 12,322.00—1937	14,166.00

"Depreciation at 4% per Year.

Original Value—$60,000.00—1906	$65,000.00
5 years— 48,923.00—1912	53,000.00
10 " — 39,792.00—1917	43,216.00
15 " — 31,148.00—1922	35,238.00
20 " — 25,398.00—1927	28,733.00
25 " — 20,709.00—1932	23,430.00
27 " — 19,086.00—1934	21,593.00
30 " — 16,887.00—1937	19,204.00

"Depreciation at 3% per Year.

Original Value—$60,000.00—1906	$65.000.00
5 years— 52,529.00—1912	56,704.00
10 " — 45,110.00—1917	48,695.00
15 " — 38,739.00—1922	41,817.00
20 " — 33,266.00—1927	35,909.00
25 " — 29,450.00—1932	30.836.00
27 " — 27,710.00—1934	29,014.00
30 " — 25,291.00—1937	26,481.00

[56]

(Testimony of E. C. Generaux.)

"Depreciation at 2% per Year.

Original Value—	$60,000.00—1906	$65,000.00
5 years—	54,236.00—1912	58,757.00
10 " —	49,022.00—1917	53,114.00
15 " —	44,313.00—1922	48,110.00
20 " —	40,048.00—1927	44,376.00
25 " —	36,128.00—1932	40,307.00
27 " —	34,698.00—1934	38,711.00
30 " —	32,659.00—1937	36,436.00"

Mr. Sharp: That is all on direct examination.

Cross Examination

Mr. Wallace: Q. Captain Generaux, did you know at the time that you made your last appraisal of this dredge that the actual insurance carried on the dredge in 1934 was $6500?

A. I did not.

Mr. Sharp: By the way, with respect to that, did you make a search for those insurance policies?

Mr. Wallace: Yes. I telephoned Mr. Haas this morning and he said that he had made a search and had not been able to find the policies, but might be able to find them. As to the Insurance Company of North America, after considerable search they told me that the record for 1926 and 1927, which were the records required, were probably stored away in some warehouse some place, but they would make a further search and endeavor to find them.

Mr. Sharp: Did you find the 1934 policy?

Mr. Wallace: I was told by the Fireman's Fund Insurance Company, which had the policy on the

(Testimony of E. C. Generaux.)

redge in 1934, that the face value of it was $6500. do not know what that policy covered, I do not now whether it covered anything more than the ull, but I am making the statement at this time, ithout the necessity of having that placed in evi- ence at my request. I [57] am merely complying ith your request.

Mr. Sharp: It might well be that they had one olicy in one company and other policies in other ompanies.

Mr. Wallace: Captain Generaux, if I understood our testimony, the appraisals that you made and re shown in the exhibits just offered in evidence, vere made for the purpose of placing insurance on hat dredge: is that correct?

A. That is correct.

Mr. Sharp: Q. As a matter of fact, is it cus- omary to give insurance for the full valuation of he boat?

A. Never. These valuations are put on this lredge, although it might have been at the request of an insurance company that Mr. Haas might have equested insurance from on the dredge, and there- ore he was asked to produce a certificate and an ppraisal on this dredge; whether the insurance ompany would accept $6500 insurance or would nly place eight or nine or ten hundred on it, that I am not familiar with, but I know they do not nsure full value.

Mr. Wallace: Q. In other words, in making your appraisal, as shown by these exhibits in the

(Testimony of E. C. Generaux.)

year 1926 of $15,000, you don't know and canno testify whether or not insurance was actually placed at the face value of $15,000?

A. No.

Q. The same would be true of your appraisa in 1927 of $14,500, would it not?

A. If there had been any discrepancy in the valuation of $15,000 in 1926, when the appraisal was made in 1927 I would have probably heard from the insurance company that my appraisal was either too high or too low, so evidently they were satisfied with the appraisal.

Q. But it is certainly customary for an insurance company to place insurance at a lower figure than the appraisal furnished by the insurer?

A. In other words, it has always been customary for the insurance company to make the owner assume some of [58] the responsibility.

Q. Do you know from your experience what the variation is in the amount written on the insurance policy and the amount of the appraisal?

A. That depends a good deal on a business and the company, and what the property insured is. Just what particular ratio there is I could not say.

Q. Of course, Captain, it is to the interest of the insured to present to the insurance company as fair an appraisal as possible, is it not; in other words, he knows that the company will write the insurance at the lower figure than the appraisal submitted by him?

(Testimony of E. C. Generaux.)

A. Well, he realizes that in the first place the insurance company does not accept the full value of the risk. It makes the owner a copartner in the risk.

Q. These particular appraisals were made by you at the request of the Union Dredging Company and not at the request of the insurance company?

A. They were.

Q. Now, in your testimony to-day with reference to the future life of this dredge, you were basing that estimate upon your last examination of this dredge, were you not?

A. I was.

Q. And that examination was made within the last month?

A. The last month.

Q. You did not, when you appraised the dredge in 1927, make any estimate of the future life of the dredge at that time?

A. No. I could have if I had been requested, but I was not requested.

Q. You were not requested?

A. No.

Mr. Sharp: Q. Captain Generaux, Mr. Wallace has suggested that when these appraisals were made that they were at the request of Mr. Haas. Mr. Haas was interested in having as high a value as possible. Did he give you instructions, any instructions at all as to the value to be placed?

A. None, whatever.

(Testimony of E. C. Generaux.)

Q. In making your valuations, were you influenced one way or the [59] other by the fact that the valuation was for insurance purposes, or were you trying to make an honest appraisal regardless of whether it favored the owners or the insurance company?

A. In my business I do not show any favoritism

Q. As a matter of fact, you do or do not do a good deal of business for insurance companies?

A. I do.

Q. If you leaned the wrong way with reference to appraisals could you be in business very long?

A. I could not.

Q. Therefore, in making any appraisals you try to make them honest appraisals regardless of who it helps?

A. Yes.

Mr. Wallace: I object to that as being counsel's testimony. I assume the witness will say yes to that, but nevertheless I object to that.

Mr. Sharp: Your objection to the question as leading is good.

A. I am only saying this from my years and years of experience. For 35 years it was the same

Mr. Wallace: But in these appraisals, and the appraisal on this particular barge, you did not take into consideration the market value of the dredge?

A. No. At the time there was not any real market value.

Q. During any of the appraisals that you made in 1926 or 1927, or during the last month, you did

(Testimony of E. C. Generaux.)

not in the slightest consider the market value of the dredge, did you?

A. No.

Q. You did not consider any economic conditions which might affect the market value of the dredge: is that correct?

A. Yes.

Mr. Sharp: Q. Did I understand you to say there was no market for such dredges at the time you made the valuation?

Mr. Wallace: He did not say that. He said he did not consider that. [60]

A. At the time I made the later valuation, or all of them?

Mr. Sharp: All of them.

A. To the best of my knowledge at those times there were no heavy sales. There might have been one or two, but there was no market, at all.

Q. No market, at all?

A. No.

Mr. Wallace: Q. As a matter of fact, is there ever any market in the sense that dredges are frequently being sold on the Pacific Coast?

A. There are not so many transfers of dredges.

Q. How many transfers of dredges have there been this year, that is, 1937?

A. I could not say.

Q. Do you know how many transfers or sales of dredges there were in 1936?

A. No.

(Testimony of E. C. Generaux.)

Q. In 1935?

A. No.

Q. In 1934?

A. No. In 1934, to the best of my knowledge, and from information and contact at that time, I did not learn of any sales.

Q. In 1926?

A. The same condition existed.

Q. In 1927?

A. The same in 1927.

Q. In other words, as I understand it, it is rather unusual for a dredge to be sold from one company to another, is it not?

A. That is the fact.

Q. It is rather an unusual condition, there are only a certain number of dredges in existence, and they are only occasionally sold?

A. It is not a business that everybody is going into, and each concern has its own equipment.

Q. There are only comparatively few concerns that are in a position to operate those dredges?

A. Yes.

Q. How many concerns would you say there are here in the Bay District which operate dredges?

A. You mean in the entire bay, or entire bay and tributaries? [61]

Q. In the entire bay and tributaries, we will say the Sacramento River.

A. There are probably 25 or 30 concerns.

Q. There are more now than there were in 1934, isn't that correct?

Testimony of E. C. Generaux.)

A. Yes, a few more.

Q. There is a great deal of work done in connection with shoals out here?

A. Yes, but we have had some dredges come from outside to take care of this heavy work.

Q. Do you know how many concerns or individuals were operating dredges in the year 1934?

A. No, I do not.

Q. Have you any idea of how many there were?

A. No.

Q. There were not as many as 25?

A. No, I doubt it.

Mr. Sharp: As a matter of fact, do you know of any that were actually operating in 1934?

A. There might have been one or two up around the Sacramento River; there is always a little repair work on the levees going on, but there was no big reclamation work, and no big levee work at that time.

Mr. Sharp: We have no further testimony.

Mr. Wallace: Will the following be stipulated to by counsel: That Mr. Cooper, President of the Olympian Dredging Company, whom we intended to call as a witness, but who is out of town to-day, would, if he had appeared as a witness, testify as follows:

That the dredge "Carson" was purchased by the Olympian Dredging Company from the Union Dredging Company for $3375, which was actually paid in cash, in October, 1934; that the sale of

that dredge by the Union Dredging Company and its purchase by the Olympian Dredging Company was a bona fide sale and purchase, and that the Olympian Dredging Company had no corporate or business relationship with the Union Dredging Company, and that neither company was a subsidiary of the other company?

Mr. Sharp: I will stipulate that if Mr. Cooper were called he would so testify. [62]

(Thereupon the case was submitted on briefs to be filed 5, 5, and 5.)

[Endorsed]: Filed Jul. 21, 1937. [63]

[Title of District Court and Cause.]

COMMISSIONER'S REPORT ON VALUE OF DREDGER CARSON. [64]

Table of Citations.

Alaska S. S. v. Inland Nav. Co., 211 Fed. 840.
Corpus Juris, Vol. 58, Sec. 1117.
Great Northern Ry. v. Weeks, 77 F.(2d) 405.
Heiner v. Crosby, 24 F.(2d) 191.
Rand v. Lockwood, 16 F.(2d) 757.
The Clyde, Vol. 166, English Reports—Full Reprint 997.
The Columbia, 37 F.(2d) 95.
The Ethelstan, 246 Fed. 187.

The Manhattan, 85 F.(2d) 427.
The Natrona, 25 F.(2d 507.
The Proteus (Standard Oil v. So. Pacific) 69 L. Ed. 890; 268 U. S. 146.
The Samson, 217 Fed. 344.
The G. K. Wentworth, 67 F.(2d) 965.
The West Hartland, 295 Fed. 547. [65]

To the Honorable Court Above-Named:

Pursuant to an order of reference heretofore made by this Court, I have taken testimony and proofs as to the value of the dredger Carson, and I now have the honor to report as follows:

Facts

The Union Dredging Company, a corporation, petitioner herein will be, for convenience, hereinafter designated as Petitioner; Hazel Brashear, claimant in behalf of certain death claims, will be hereinafter referred to as Claimant.

The Petitioner has filed a petition for limitation of its liability to the value of the dredger in question. In 1907 the Petitioner purchased the Carson for $20,000.00. At that time the dredger was, roughly, about one year of age. It had been constructed from machinery transferred from the gold mines at Carson, Nevada. [66] The dredger is built of wood. It is seventy-six feet in length, forty feet in width, and has a depth of eight feet. It has two maindecks and what may be called a third deck upon which is constructed wood quarters for hous-

ing the crew of the dredger. The boom is around one hundred and fifteen feet.

Claimant's death claims are predicated upon the accidental death of Earl Brashear, whose unfortunate demise occurred on May 28, 1934, while the said deceased was employed upon the Carson.

On October 25, 1934 (the date of the bill of sale), the petitioner sold the dredger to the Olympian Dredging Company for the consideration of $3,375.00.

Although, this sale was bona fide, the record shows that in 1934 dredgers of the type of the Carson were considered "off size"; that there was during 1934 a slackening of dredge work; and that since 1933, no sales of similar dredgers (other than the instant sale) have been made. Consequently there was, in effect, no market for such a dredger.

The Issues Involved

The first issue is to determine whether or not the sale consummated in 1934 represented the fair value of the dredger. If it be not the fair value, then, secondly, to ascertain such value.

"Value" may be easily computed. On the other hand, it may be most difficult in computation. This thought is expressed by the Court in The Manhattan, 85 F.(2d) 427 C. C. A. 3rd, as follows:

> "This suggests the word 'value' than which there is no word in our language more often abused or is used in more different senses."

The most accurate and most frequently employed standard of "fair value" is market price. This

eneral rule is expressed in Corpus Juris, Vol. 58, Sec. 1117 in the following language:

> "Where the owner who seeks to limit his liability elects to retain the vessel and to pay into court, or to give security for the appraised amount or value of such vessel, the appraised value or amount governs in determin- [67] ing the extent of liability if liability is shown. In arriving at the value of a vessel for limitation purposes, if the vessel has a market value, that value, ordinarily is the one to be taken, or it is, at least, entitled to considerable weight, and book value and reconstruction cost out of all proportion to the market value may properly be disregarded."

This market price or market value (the price a purchaser is willing to pay in the open market) is the doctrine of law generally invoked by the Courts. Vide:

Alaska SS Co. v. Inland Nav. Co., 211 Fed. 840 (C. C. A. 9th);

The Columbia, 37 F.(2d) 95, (C. C. A. 2nd);

The G. K. Wentworth, 67 F.(2d) 965 (C. C. A. 9th);

The West Hartland, 295 Fed. 547;

The Ethelstan, 246 Fed. 187.

Dr. Lushington followed the "market price" doctrine in The Clyde, Vol. 166 English Reports—Full Reprint, pg. 997 by citing this quotation, "The worth of a thing is the price it will bring."

There is, however, an established restriction or limitation in the application of the market price or market value rule. Manifestly, to constitute the market price as the fair value, there must be a recognized market for the object or commodity involved. Vide:

The Samson, 217 Fed. 344 (C. C. A. 9th);
The Proteus, 69 L. Ed. 890; 268 U. S. 146 (Standard Oil Co. vs. So. Pac. Co.);
The Manhattan, 85 Fed.(2d) 427 (C. C. A. 3rd);
The Natrona, 25 Fed.(2d) 507;
Great Northern Ry. Co. v. Weeks, 77 F.(2d) 405 (C. C. A. 8th).

Single sales or sales in a restricted market, or forced sales are not, generally, indicative of fair value. Vide:

The Samson, ubi supra;
The Proteus, ubi supra. [68]

The Court in Heiner v. Crosby, 24 F.(2d) 191 (C. C. A. 3rd) clearly defined market price as follows:

"Market price implies the existence of a market of supply and demand, or sellers and buyers.

"Sales made under peculiar and unusual circumstances, such as sales of small lots, forced sales, and sales in a restricted market may neither signify a fair market price or value."

In the present matter, there was no market for such dredgers as the Carson. The evidence revealed

o sales of similar dredgers (other than the Carson) luring the years of 1934, 1935, and 1936. Obviously, his one sale should not be considered as an adequate eflection of the fair or reasonable value of such lredges unless the sale price actually reflects the rue value.

The testimony of the expert witness (Captain Jenereaux) positively establishes that the particular sale price was far below the fair value of the Carson. It is my conviction that the said sale price was altogether too low to be construed as fair value or even a fair market price.

If the sale price be unreasonable, how can the fair value be established? The authorities hold that whenever circumstances reveal the absence of an active market, methods other than market price may be resorted to as guides. Vide:

The Proteus, ubi supra;
Corpus Juris, Vol. 58, Sec. 1117;
The Natrona, ubi supra;
The Samson, ubi supra;
Heiner v. Crosby, ubi supra.

One method of fixing fair value under such circumstances is the so-called reproduction cost of the dredge at the time of the sale after deducting a proper rate for depreciation from the date of its construction. This system was employed in The Samson ubi supra, and has been used under the decisions of the Supreme [69] Court as indicated in The Proteus, ubi supra. Vide also

Rand vs. Lockwood, 16 F.(2d) 757.

The uncontroverted evidence adduced before me is to the effect that the reproduction cost of the dredge at the time of the sale would have amounted to $60,000.00 or $65,000.00.

Rates of depreciation vary from two per cent to five per cent. (Vide The Proteus, ubi supra, for a discussion of rates) If depreciation be computed upon a basis of five per cent yearly, on a reproduction cost of $60,000.00, the fair value in 1934 would be $14,370.00. On a basis of deterioration at the rate of two per cent per annum, the fair value upon a reproduction cost of $60,000.00 in 1934 would be $34,698.00.

In my opinion the reproduction cost method which establishes the fair value anywhere from $14,370.00 to $34,698.00 is unfair because the value is, I feel, too high.

The determination of value is as, suggested by the Supreme Court, in The Proteus, ubi supra, "not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts."

Opinions of experts may be used in the ascertainment of value. Vide:

Heiner v. Crosby, ubi supra.

Captain Genereaux, an expert witness, testified that the fair value of the Carson in 1934 was $9,500.00. (Incidentally, he established that such dredgers may be in operation for fifty years.)

It is my conviction that under the circumstances, he appraisal of the expert witness of $9,500.00 represents the fair value of the dredge at the time of he sale.

Findings of Fact

I find as follows:

One, there was no market in 1934, therefore was o fair [70] market price.

Two, the sum of $9,500.00 is the fair and reasonble value of the Carson at the time of the accident.

Conclusions.

The Petitioner is entitled to a decree establishing he fair value of the Carson in the sum of $9.500.00.

A portion of two days was devoted to hearing the estimony in this matter. In addition, I spent beween six and seven days in the preparation of this eport. I request, as compensation for this service, he sum of $125.00, which compensation should be axed as costs.

Dated: July 21, 1937.

Respectfully submitted,
ERNEST E. WILLIAMS,
U. S. Commissioner.

In conjunction with this report, I herewith file he following:

Transcript of testimony (Volumes 1 and 2).
Exhibits 1 to 5 inclusive (introduced by claimant).
Petitioner's Brief.

Claimant's Reply Brief.
Letter from Petitioner, dated June 23, 1937.

Respectfully,
ERNEST E. WILLIAMS,
U. S. Commissioner.

[Endorsed]: Filed Jul. 21, 1937. [71]

[Title of District Court and Cause.]

EXCEPTIONS TO COMMISSIONER'S REPORT ON VALUE OF DREDGER CARSON.

Comes now the petitioner Union Dredging Company, a corporation, and respectfully excepts to the Commissioner's report on the value of the dredger "Carson", which was filed herein on July 21st, 1937, upon the following grounds:

I.

Because said Commissioner has erroneously fixed the value of the dredger "Carson" in 1934 at $9500.00 notwithstanding the fact that there was a bona fide sale in 1934 of said dredger in the open market for $3375.00.

II.

Because said Commissioner erroneously appraised said dredger as having a value of $9500.00 in 1934, based upon [72] the testimony of one of the witnesses, Captain Genereaux, notwithstanding the fact that said witness had only inspected said dredger, for insurance purposes, in 1926 and 1927, and did

ot see said dredger at any time between 1927 and 937.

III.

Because said Commissioner erroneously interreted and applied the law with respect to apraisals in limitation of liability proceedings, paricularly in that he failed to appraise said dredger t its market price in 1934.

IV.

Because said Commissioner erroneously found: pages 5 and 6 of his report) (1) that there was no narket in 1934, (2) that there was no fair market rice in 1934, and (3) that the fair and reasonable alue of the dredger "Carson" was $9500.00.

V.

Because there was no evidence before the Commissioner sufficient to show that the value of the dredger "Carson" was $9500.00 in 1934.

VI.

Because the evidence before the Commissioner ndisputably showed that in 1934 the dredger "Carson" had been sold in the open market by a willing seller to a willing buyer, after bargaining as to rice, and that said sale was in all respects bona ide.

Said exceptions will be based upon the Commissioner's Report filed on July 21, 1937, the transcript of testimony filed therewith, the briefs filed

by the parties hereto, and upon all the records and papers on file herein.

Wherefore said petition prays that said ex- [73] ceptions be allowed and that the report of said Commissioner be rejected, and that a further rehearing upon the appraisal be had if the court should deem it necessary and for such other relief as may be just and proper.

Dated: July 26, 1937.

JAMES M. WALLACE,
REDMAN, ALEXANDER & BACON,
Proctors for Petitioner.

(Admission of Service).

[Endorsed]: Filed Jul. 27, 1937. [74]

[Title of District Court.]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 6th day of August, in the year of our Lord one thousand nine hundred and thirty-seven.

Present: The Honorable Michael J. Roche, District Judge.

No. 22399-R.

[Title of Cause.]

The Exceptions to Commissioner's Report on value of Dredger "Carson", heretofore heard and submitted, being now fully considered, it is ordered

hat said Exceptions be and the same are hereby verruled and that the Commissioner's Report be nd the same is hereby confirmed. [75]

Title of District Court and Cause.]

STIPULATION FOR APPRAISED VALUE.

Whereas petitioner, Union Dredging Company, a orporation, as former owner of the dredger "Carson", has instituted a proceeding in this court for imitation of and exemption from liability with respect to all claims arising out of and during a voyage of said vessel, which commenced on or about he 9th day of May, 1934, and which ended on or about the 28th day of May, 1934, at McNear's Point, San Francisco Bay, California, as is more particularly set forth in the petition for limitation of and exemption from liability filed herein on the 23rd day of December, 1936, in which petitioner prays, among other things, that the court will cause due appraisement to be made of the value of the interest of said petitioner in said dredger "Carson", together with her machinery, tackle, apparel, furniture, and appurtenances, and freight pending, if any, as the same existed at the termination of the said voyage; and

It appearing that pursuant to an order of this court, appraisement was made by the Honorable Ernest E. Williams of the value of petitioner's interest in said dredger "Carson", her machinery, tackle, furniture and appurtenances, and freight

pending, if any, as the same existed at the termination of the voyage mentioned in said petition, and that said Honorable Ernest E. Williams, found the value of petitioner's interest in said dredger "Carson", her machinery, tackle, furniture and appurtenances, to be the sum of $9500.00, and that there was no freight pending; and

It further appearing that the report of said appraiser Honorable Ernest E. Williams was heretofore filed with this court, and that exceptions to said report thereafter filed by the petitioner were overruled by this Court, and the said [76] report was confirmed; and

Whereas said petitioner desires to prevent the further prosecution of the proceedings and actions already instituted against petitioner, as former owner of said dredger "Carson", and to prevent the prosecution hereafter of any and all suits, actions or legal proceedings of any nature whatsoever against petitioner arising out of or during the voyage mentioned in said petition;

Now, therefore, the condition of this stipulation is such that if the petitioner herein, Union Dredging Company, a corporation, as principal, and Columbia Casualty Company, a corporation, organized and existing under and by virtue of the laws of the State of California, having its principal office and residence in the City and County of San Francisco, in the Northern District of California, and duly licensed to transact a general surety business in the State of California, as surety, shall abide by all orders of the court, interlocutory and final,

nd pay into court the said sum of $9500.00, with nterest from the 28th day of May, 1934, and costs, henever the same shall be ordered by this court, r by an appellate court, if an appeal intervene, nen this stipulation to be void; otherwise to remain n full force and effect.

The stipulators hereto hereby consent that in ase of default or contumacy on the part of the prin-ipal or surety herein, execution to the amount amed in this stipulation may issue against the oods and lands of the stipulators hereto, and said urety alleges that it is worth double the amount of his stipulation over all its debts and liabilities. This ecognizance shall be deemed and construed to con-ain the "express agreement" for summary judg-nent, and execution thereon, mentioned in Rule 34 f the District Court. [77]

[Seal] UNION DREDGING COMPANY,
a corporation,
By EDW. F. HAAS,
Its President.

[Seal] COLUMBIA CASUALTY COM-
PANY, a corporation,
By ERNEST W. SWINGLEY,
Its Attorney-in-fact.

Dated: San Francisco, California, August 24th, 937.

Approved:

MICHAEL J. ROCHE,
U. S. District Judge.

(Acknowledgment).

[Endorsed]: Filed Aug. 27, 1937. [78]

[Title of District Court and Cause.]

ANSWER OF CLAIMANT, HAZEL BRASHEAR

Now comes the above named claimant, Hazel Brashear, appearing herein as administratrix of the Estate of Earl Brashear, deceased and on behalf of herself personally and on behalf of Richard Brashear and Gloria Brashear, her minor children, and by way of answer to the petition of Union Dredging Company, denies, admits and alleges as follows:

I.

Claimant admits the allegations contained in paragraph I of said petition. [79]

II.

Claimant denies the allegation contained in paragraph II that the dredger Carson was not a sea-going vessel.

III.

Claimant denies that on the 17th day of May, 1934, or any other time, or at all, said dredger Carson was on the course of a voyage, or any voyage which commenced or ended on or about the dates mentioned in said petition, or any time whatever. In this connection claimant alleges that said dredger Carson was engaged in dredging operations at all times and at no time was on the course of any voyage whatever. Claimant denies that at the times mentioned in said petition, or at any time whatever, said dredger was properly manned, equipped or supplied, or was in all respects staunch or seawor-

hy. On the contrary, claimant alleges that petitioner negligently failed to maintain said vessel as reasonably safe place on which the seamen aboard ould do their work, and that petitioner negligently ailed to equip said vessel and supply it with safe neans, materials, appliances and devices in and for he performance of the work to be done, and negigently failed to provide a suitable life boat, life preserver or life ring to be used for the rescue of ny person going overboard, or any other device for he rescue of such persons.

IV.

Claimant denies that the death of said Earl F. Brashear was proximately caused by his own fault, negligence or intentional act, and expressly denies hat he negligently or carelessly failed to take precautions for his own safety or intentionally jumped overboard. On the contrary, the death of said Earl F. Brashear was proximately caused by the negligence of petitioner herein in [80] matters and respects more specifically elsewhere herein set forth.

V.

Claimant denies each and every, all and singular, he allegations contained in paragraph V of said petition.

VI.

Claimant denies each and every, all and singular, he allegations contained in paragraph VI of said petition. In this regard, claimant alleges that the value of the Carson on or about May 17, 1934, was a sum in excess of $9500.00 and that the Commis-

sioner appointed by the Court has fixed the value of said Carson at said sum of $9500.00 and this court has by its order duly made, approved and confirmed the order of the Commissioner with respect to the value of said dredger Carson.

VII.

Claimant denies each and every, all and singular, the allegations contained in paragraph VII of said petition.

VIII.

Claimant admits each and every, all and singular, the allegations contained in paragraph VIII of said petition.

XI.

With respect to paragraph XI of said petition, claimant alleges that petitioner is not entitled to have its liability in connection with or arising out of the death of said Earl F. Brashear limited.

XII.

Claimant denies that all and singular the premises are true, except as above admitted. Claimant admits the admiralty jurisdiction of this Honorable Court. [81]

And by way of further answer to petition of Union Dredging Company, claimant alleges as follows:

I.

Claimant is the duly appointed, qualified and acting administratrix of the estate of Earl Brashear, deceased. Claimant is the widow of said Earl

Brashear, deceased, and the mother of all of his children, to-wit, Richard Brashear and Gloria Brashear, who are now minors.

II.

Said Earl Brashear deceased left surviving him certain dependent relatives. Said dependent relatives are the persons named in the foregoing paragraph, and said Earl Brashear left no other such relatives. Said relatives are his widow, Hazel Brashear, claimant herein, and two minor children, to-wit, Richard Brashear and Gloria Brashear, and claimant files this claim for their benefit as dependent relatives of said deceased, as well as on behalf of herself and said minor children personally.

III.

At all times herein mentioned, petitioner, Union Dredging Company, was and now is a corporation organized and existing under and by virtue of the laws of the State of California, and was the sole owner and operator of a certain vessel known as the Carson.

IV.

On or about the 14th day of May, 1934, said deceased was duly and regularly employed by petitioner, Union Dredging Company, to work as a member of the crew of said vessel, the Carson, to-wit, as a fireman thereon, and in connection with the navigation of said vessel; from said 14th day of May, 1934, to and including the date of the happening of the accident hereinafter [82] set out,

deceased was continuously present and employed on said vessel as such member of the crew and engaged in the navigation of said vessel and received his board and lodging on such vessel as such member of the crew.

V.

On or about the 17th day of May, 1934, said vessel, the Carson was on and in the navigable waters of San Francisco Bay, at a point approximately two and three-quarter miles east of Hamilton Point, Marin County, California, and was then and there being used by petitioner, Union Dredging Company, in a project on behalf of and under a contract with the War Department of the United States, to-wit, in making and deepening a channel from the mainland at said Hamilton Point eastward to the deeper waters of said San Francisco Bay, so that said channel would be suitable for purposes of navigation by vessels, particularly vessels connected with the military operations of said War Department of the United States Government; at said time and place, while in the service of petitioner, Union Dredging Company, and while in the course of his employment and under the control of and subject to the orders and authority of petitioner's servant, Dan Forsyth, master of said vessel, deceased became subject to a violent attack of a mental disorder; that at such time and place, as a result of said attack, deceased, said Earl Brashear, was stripped of all mental capacity and became absolutely irresponsible and unable to control his acts or conduct; that

t said time and place, said attack manifested itself n delirious ravings and in open and repeated at- empts on the part of deceased to jump overboard nto the waters of said San Francisco Bay. [83]

VI.

For several hours prior to the happening of the ccident hereinafter set out, petitioner, Union redging Company, through its servants, agents nd employees, and petitioner's servants, had full nowledge of deceased's said condition and of the xtent, seriousness and dangerous character there- f; that notwithstanding such knowledge, and nowledge of deceased's efforts to jump over- oard, as above set forth, petitioner negligently nd carelessly failed to take precautions, whether y removing deceased from the vessel to the land, or by placing deceased in a safe place on such vessel, or otherwise, to prevent the happening of the accident hereinafter mentioned; that at all times herein mentioned, petitioner had at their disposal the means of taking such precautions and were fully able to do so, but notwithstanding such ability, petitioner negligently and carelessly failed to take such or any precautions; that, as a direct and proximate result of said negligence and carelessness of petitioner, and of the facts herein set out, deceased suffered the fatality hereinafter mentioned.

VII.

That at said time and place, deceased, being completely irresponsible and without mental capacity,

in consequence of the said attack of mental disorder, was negligently and carelessly permitted by petitioner to jump overboard into the said San Francisco Bay; that after deceased had been permitted to jump overboard, as above stated, petitioner undertook to rescue deceased from said waters, but said attempt at rescuing deceased was negligently and carelessly made, and in consequence thereof, deceased was not rescued from the said waters; that in particular, petitioner, made no attempt to reach deceased in a small boat or any boat; [84] that as a direct and proximate result of said negligence and carelessness of petitioner, and of the facts herein set out, deceased was drowned, and claimant, his widow, and her two minor children suffered the damage hereinbelow set out.

VIII.

Claimant, Hazel Brashear, was entirely dependent upon deceased for her maintenance and support; that the sum of Twenty-five Thousand ($25,000) Dollars is the present cash value of the pecuniary benefits of which said claimant has been deprived through the death of deceased.

IX.

Richard Brashear, the minor child of claimant, and said deceased, was entirely dependent upon deceased for his maintenance and support; the sum of Ten Thousand ($10,000) Dollars is the present cash value of the pecuniary benefits of which said Richard Brashear has been deprived through the death of deceased.

X.

Gloria Brashear, the minor child of claimant, and said deceased, was entirely dependent upon deceased for her maintenance and support; the sum of Ten Thousand ($10,000) Dollars is the present cash value of the pecuniary benefits of which said Gloria Brashear has been deprived through the death of deceased.

XI.

No credits have been given to claimant with respect to the above claims nor has any payment been made on the amounts due to claimant.

And as a further and separate answer to petition of Union Dredging Company, claimant alleges as follows: [85]

I.

Claimant refers to all the paragraphs set forth above in the first further defense and hereby expressly incorporates and includes them in this second and further defense, as fully as if they were herein set out in full.

II.

Said petitioner negligently failed to furnish said deceased a reasonably safe place in which to do his work; negligently failed to equip said vessel and supply said deceased with suitable and safe means, materials, appliances and devices in and for the performance of his work, and negligently failed to maintain any such means, materials, appliances and devices in proper condition for the performance of the work assigned to said deceased, and negligently failed to provide a suitable life boat, life

preserver or life ring to be used for the rescue of any person going overboard, or other device for the rescue of any person going overboard, or other device for the rescue of such persons.

Wherefore, this claimant respectfully makes and files herein this claim against petitioner herein and prays:

(1) That the petition herein for exoneration from liability be denied;

(2) That petitioner's petition for limitation of liability be denied.

(3) That a decree be entered that claimant, Hazel Brashear, do have and recover the sum of $45.000.00, plus interest and costs from the date of death of said deceased, to-wit, May 17, 1934.

(4) That the Commissioner appointed to receive claims herein report to the above entitled court that the aforesaid [86] sum is due to this claimant together with interest thereon from May 17, 1934;

(5) That claimant may have her costs of suit herein;

(6) That claimant may have such other and further relief administered in the premises as may be meet and proper.

Dated: September 28, 1937.

HONE & HONE

DERBY, SHARP, QUINBY & TWEEDT

Proctors for Claimant

(Verification)

[Endorsed]: Filed Sep. 28, 1937. [87]

[Title of District Court and Cause.]

CLAIM OF HAZEL BRASHEAR AS ADMINISTRATRIX OF THE ESTATE OF EARL BRASHEAR, DECEASED: ALSO ON BEHALF OF HERSELF PERSONALLY AND ON BEHALF OF RICHARD BRASHEAR AND GLORIA BRASHEAR HER MINOR CHILDREN FOR $45,000.00 DAMAGES ON ACCOUNT OF THE DEATH OF EARL BRASHEAR

Now comes Hazel Brashear, claimant above named, and makes and files herein her claim against petitioner above named and against any and all funds deposited in court by petitioner, and against any and all bonds and stipulations filed or to be filed by petitioner herein, and in connection with said claim alleges as follows: [88]

I.

Claimant is the duly appointed, qualified and acting administratrix of the estate of Earl Brashear, deceased. Claimant is the widow of said Earl Brashear deceased, and the mother of all of his children, to-wit, Richard Brashear and Gloria Brashear, who are now minors.

II.

Said Earl Brashear deceased left surviving him certain dependent relatives. Said dependent relatives are the persons named in the foregoing paragraph and said Earl Brashear left no other such

relatives. Said relatives are his widow, Hazel Brashear, claimant herein, and two minor children, to-wit, Richard Brashear and Gloria Brashear, and claimant files this claim for their benefit as dependent relatives of said deceased, as well as on behalf of herself and said minor children personally.

III.

At all times herein mentioned, petitioner, Union Dredging Company, was and now is a corporation organized and existing under and by virtue of the laws of the State of California, and was the sole owner and operator of a certain vessel known as the "Carson".

IV.

On or about the 14th day of May, 1934, said deceased was duly and regularly employed by petitioner, Union Dredging Company, to work as a member of the crew of said vessel, the Carson, to-wit, as a fireman thereon, and in connection with the navigation of said vessel; from said 14th day of May, 1934, to and including the date of the happening of the accident hereinafter set out, deceased was continuously present and employed on said [89] *said* vessel as such member of the crew and engaged in the navigation of said vessel and received his board and lodging on such vessel as such member of the crew.

V.

On or about the 17th day of May, 1934, said vessel, the Carson was on and in the navigable waters

of San Francisco Bay, at a point approximately two and three-quarter miles east of Hamilton Point, Marin County, California, and was then and there being used by petitioner, Union Dredging Company, in a project on behalf of and under a contract with the War Department of the United States, to-wit, in making and deepening a channel from the mainland at said Hamilton Point eastward to the deeper waters of said San Francisco Bay, so that said channel would be suitable for purposes of navigation by vessels, particularly vessels connected with the military operations of said War Department of the United States Government; at said time and place, while in the service of petitioner, Union Dredging Company, and while in the course of his employment and under control of and subject to the orders and authority of petitioner's servant, Dan Forsyth, master of said vessel, deceased became subject to a violent attack of a mental disorder; that at such time and place, as a result of said attack, deceased, said Earl Brashear, was stripped of all mental capacity and became absolutely irresponsible and unable to control his acts or conduct; that at said time and place, said attack manifested itself in delirious ravings and in open and repeated attempts on the part of deceased to jump overboard into the waters of said San Francisco Bay.

VI.

For several hours prior to the happening of the accident [90] hereinafter set out, petitioner, Union Dredging Company, through its servants, agents

and employees, and petitioner's servants, had full knowledge of deceased's said condition and of the extent, seriousness and dangerous character thereof; that notwithstanding such knowledge, and knowledge of deceased's efforts to jump overboard, as above set forth, petitioner negligently and carelessly failed to take precautions, whether by removing deceased from the vessel to the land, or by placing deceased in a safe place on such vessel, or otherwise, to prevent the happening of the accident hereinafter mentioned; that at all times herein mentioned petitioner had at their disposal the means of taking such precautions and were fully able to do so, but notwithstanding such ability, petitioner negligently and carelessly failed to take such or any precautions; that as a direct and proximate result of said negligence and carelessness of petitioner, and of the facts herein set out, deceased suffered the fatality hereinafter mentioned.

VII.

That at said time and place, deceased, being completely irresponsible and without mental capacity, in consequence of the said attack of mental disorder, was negligently and carelessly permitted by petitioner to jump overboard into the said San Francisco Bay; that after deceased had been permitted to jump overboard, as above stated, petitioner undertook to rescue deceased from said waters, but said attempt at rescuing deceased was negligently and carelessly made, and in consequence thereof,

deceased was not rescued from the said waters; that in particular, petitioner, made no attempt to reach deceased in a small boat or any boat; that as a direct and proximate result of said negligence and carelessness [91] of petitioner, and of the facts herein set out, deceased was drowned, and claimant, his widow, and her two minor children suffered the damage hereinbelow set out.

VIII.

Claimant, Hazel Brashear, was entirely dependent upon deceased for her maintenance and support; that the sum of Twenty-five Thousand ($25,000) Dollars is the present cash value of the pecuniary benefits of which said claimant has been deprived through the death of deceased.

IX.

Richard Brashear, the minor child of claimant, and said deceased, was entirely dependent upon deceased for his maintenance and support; the sum of Ten Thousand ($10,000) Dollars is the present cash value of the pecuniary benefits of which said Richard Brashear has been deprived through the death of deceased.

X.

Gloria Brashear, the minor child of claimant, and said deceased, was entirely dependent upon deceased for her maintenance and support; the sum of Ten Thousand ($10,000) Dollars is the present cash value of the pecuniary benefits of which said Gloria

Brashear has been deprived through the death of deceased.

XI.

No credits have been given to claimant with respect to the above claims nor has any payment been made on the amounts due to claimant.

And as a Further, Separate and Second Cause of Claim, claimant alleges as follows:

I.

Claimant refers to all the paragraphs set forth above in the first cause of claim and hereby expressly incorporates and includes them in this second cause of claim as fully as if they were herein set out in full. [92]

II.

Said petitioner negligently failed to furnish said deceased a reasonably safe place in which to do his work; negligently failed to equip said vessel and supply said deceased with suitable and safe means, materials, appliances and devices in and for the performance of his work, and negligently failed to maintain any such means, materials, appliances and devices in proper condition for the performance of the work assigned to said deceased, and negligently failed to provide a suitable life boat, life preserver or life ring to be used for the rescue of any person going overboard, or other device for the rescue of any person going overboard, or other device for the rescue of such persons.

Wherefore, this claimant respectfully makes and files herein this claim against petitioner herein and prays:

(1) That the petition herein for exoneration from liability be denied;

(2) That petitioner's petition for limitation of liability be denied;

(3) That a decree be entered that claimant, Hazel Brashear, do have and recover the sum of $45,000.00 plus interest and costs from the date of death of said deceased, to-wit, May 17, 1934.

(4) That the Commissioner appointed to receive claims herein report to the above entitled court that the aforesaid sum is due to this claimant together with interest thereon from May 17, 1934;

(5) That claimant may have her costs of suit herein;

(6) That claimant may have such other and further relief administered in the premises as may be meet and proper.

Dated: September 28, 1937.

HONE & HONE
DERBY, SHARP, QUINBY & TWEEDT
Proctors for Claimant

(Verification)

[Endorsed]: Filed Sep. 28, 1937. [93]

[Title of District Court and Cause.]

EXCEPTIONS TO ANSWER OF CLAIMANT, HAZEL BRASHEAR.

Comes now the petitioner, Union Dredging Company, a corporation, and excepts to the answer of claimant, Hazel Brashear, on file herein upon the following grounds:

I.

That all of said answer on pages 4, 5, 6, 7 and 8 in which said claimant purports to set forth affirmative allegations in the nature of a cross-complaint, are surplusage and should be expunged.

II.

That the affirmative allegations in the nature of a cross-complaint contained on pages 4, 5, 6, 7 and 8 do not state facts sufficient to constitute a cause of action or claim herein.

III.

That said answer is uncertain in each of the following particulars:

(a) In that it can not be ascertained therefrom how or in what manner said Earl Brashear could have been engaged in the course of his employment at and immediately prior to the time of his death, it appearing from paragraph V, page 5, of said answer that he was stripped of all mental capacity and absolutely irresponsible, and that he was subject to delirious ravings;

(b) In that it can not be ascertained therefrom ow or in what manner petitioner was negligent;

(c) In that it can not be ascertained therefrom ow or what manner petitioner could have pre-ented the said Earl Brashear from jumping over-oard;

(d) In that it can not be ascertained therefrom ow or in what manner the alleged negligence of etitioner proximately contributed to the death of aid Earl Brashear;

(e) In that it can not be ascertained therefrom ow [94] or in what manner petitioner was negli-ent in undertaking to rescue the said Earl Bra-hear from the water;

(f) In that it can not be ascertained therefrom ow or in what manner the sum of $25,000.00 re-erred to in paragraph VIII, page 7, of said answer s computed;

(g) In that it can not be ascertained therefrom ow or in what manner the sum of $10,000.00 re-erred to in paragraph IX, page 7, of said answer s computed;

(h) In that it can not be ascertained therefrom ow or in what manner the sum of $10,000.00 re-ferred to in paragraph X, page 7, of said answer s computed;

(i) In that it can not be ascertained therefrom ow or in what respect petitioner negligently failed to furnish said Earl Brashear with a reasonably safe place in which to do his work, as alleged in paragraph II, page 8 of said answer;

(j) In that it can not be ascertained therefrom how or in what respect petitioner negligently failed to equip said vessel and supply said Earl Brashear with suitable and safe means, materials, appliances and devices in and for the performance of his work as alleged in paragraph II, page 8 of said answer;

(k) In that it can not be ascertained therefrom what means, materials, appliances and devices are referred to in paragraph II, page 8 of said answer;

(l) In that it can not be ascertained therefrom how or in what manner petitioner negligently failed to maintain such means, materials, appliances and devices in proper condition for the performance of the work assigned to said Earl Brashear;

(m) In that it can not be ascertained therefrom how said petitioner was negligent in failing to provide a suitable life boat, life preserver or life ring, it appearing from [95] said answer that said Earl Brashear was employed on a dredger, and it not appearing that a dredger is required by law, or otherwise, to be provided with a life boat, life preserver, or life ring.

Wherefore petitioner prays that said answer be dismissed, and for such other and further relief as may be just and proper in the premises.

J. M. WALLACE
REDMAN, ALEXANDER AND BACON
Proctors for Petitioner

Dated: October 4, 1937
(Admission of service)

[Endorsed]: Filed Oct. 5, 1937. [96]

[Title of District Court and Cause.]

EXCEPTIONS TO CLAIM OF HAZEL BRASHEAR.

Comes now the petitioner, Union Dredging Company, a corporation, and excepts to the claim on file herein of Hazel Brashear, which claim was filed by said Hazel Brashear as administratrix of the estate of Earl Brashear, deceased, and on behalf of herself personally and on behalf of Robert Brashear and Gloria Brashear, her minor children, upon the following grounds:

I.

That said claim does not state facts sufficient to constitute a cause of action or claim herein.

II.

That the first cause of claim does not state facts sufficient to constitute a cause of action or claim herein.

III.

That the second cause of claim does not state facts sufficient to constitute a cause of action or claim herein.

IV.

That the first cause of claim is uncertain in each of the following particulars:

(a) In that it can not be ascertained therefrom when the said Earl Brashear first became subject to violent attacks of mental disorder as alleged in paragraph V;

(b) In that it can not be ascertained therefrom how or in what respect said petitioner was negligent;

(c) In that it can not be ascertained therefrom how the said Earl Brashear could be acting in the course of his employment at the times mentioned in said claim, it appearing therefrom that he was stripped of all mental capacity and absolutely irresponsible, and was engaged in delirious ravings;

[97]

(d) In that it can not be ascertained therefrom how or in what manner said defendant was negligent in attempting to rescue said Earl Brashear;

(e) In that it can not be ascertained therefrom how or in what manner the sum of $25,000.00 mentioned in paragraph VIII is computed;

(f) In that it can not be ascertained therefrom how or in what manner the sum of $10,000.00 referred to in paragraph IX is computed;

(g) In that it can not be ascertained therefrom how or in what manner the sum of $10,000.00 referred to in paragraph X is computed;

V.

That the second cause of claim is uncertain for each of the following reasons:

(a) That said second cause of claim is uncertain for each and all of the reasons that the first cause of claim is hereinbefore specified to be uncertain;

(b) In that it can not be ascertained therefrom how or in what manner petitioner negligently failed to furnish said deceased with a reasonably safe place in which to do his work;

(c) In that it can not be ascertained therefrom how or in what manner petitioner negligently failed to equip said vessel and supply said deceased with suitable and safe means, materials, appliances and devices in and for the performance of his work;

(d) In that it can not be ascertained therefrom how or in what respect said petitioner negligently failed to maintain such means, materials, appliances and devices in proper condition for the performance of the work assigned to said deceased; [98]

(e) In that it can not be ascertained therefrom what means, materials, appliances and devices are referred to in paragraph II of the second cause of claim;

(f) In that it can not be ascertained therefrom how or in what manner said petitioner was negligent in failing to provide a suitable life boat, life preserver, or life ring it appearing that said Earl Brashear was employed on the dredger and it not appearing that a dredger is required by law or otherwise to be provided with a life boat, life preserver, or life ring;

Wherefore your petitioner prays that the said claim be dismissed, and for such other and further relief as may be just and proper in the premises.

JAMES M. WALLACE
REDMAN ALEXANDER & BACON
Proctors for Petitioner

(Admission of service)

[Endorsed]: Filed Oct. 5, 1937. [99]

[Title of District Court.]

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 14th day of December, in the year of our Lord one thousand nine hundred and thirty-seven.

Present: The Honorable Michael J. Roche, District Judge.

[Title of Cause.]

The Exceptions to Answer of Claimant, Hazel Brashear, heretofore submitted, being now fully considered, It Is Ordered that said Exceptions be and the same are hereby overruled. [100]

[Title of District Court.]

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 11th day of March, in the year of our Lord one thousand nine hundred and thirty-eight.

Present: The Honorable Michael J. Roche, District Judge.

[Title of Cause.]

The petition for limitation of and exemption from liability and the claim of Hazel Brashear, as

dministratrix, etc., et al, came on this day for earing James M. Wallace and Jewel Alexander, sqrs., appearing as Proctors for the petitioner, nd Joseph C. Sharp, Donald Lobree and Charles lemmings, Esqrs., appearing as Proctors for the laimants. Mr. Wallace made a statement to the ourt on behalf of the petitioner and Mr. Sharp ade a statement to the Court on behalf of the laimants. Edward F. Haas was sworn and testied on behalf of the petitioner, and the petitioner ested. John Pedersen, John Thomas Fancort, Hazel Brashear, Morse Hiatt, William A. Bishop, drian J. McPherson, Sadie Bourn, were sworn nd testified on behalf of the Claimants. [101] Mr. harp introduced in evidence and filed Claimants' xhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8. Thereupon Claimnts rested. Stewart J. Mackie was sworn and tesified on behalf of the petitioner. Ordered that the urther trial hereof be continued to Tuesday, March 5, 1938, at 10 a. m. [102]

[Title of District Court.]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof in the City and County of San Francisco, on Tuesday, the 15th day of March, in the year of our Lord one thousand nine hundred and thirty-eight.

Present: The Honorable Michael J. Roche, District Judge.

[Title of Cause.]

The parties hereto being present as heretofore the further hearing hereof was thereupon resumed O. B. Cavanaugh, Carl Vogel and Daniel Forsyth were sworn and testified on behalf of the petitioner and Hazel Brashear was recalled for further cross examination by the petitioner. The petitioner rested. Hazel Brashear was recalled and testified on behalf of the claimants in rebuttal, and the evidence was thereupon closed. Mr. Alexander made a motion to strike out certain evidence and made a motion for judgment on behalf of the Union Dredging Company on the grounds stated. Mr. Sharp made a motion to deny the petition for limitation of liability on the grounds stated and after hearing had it is ordered that the motion to strike out certain evidence, the motion for [103] judgment, and the motion to deny petition for limitation of liability be and each of them is hereby denied, and the parties allowed an exception to the ruling of the Court. After argument by the Proctors for the respective

arties, it is ordered that the claimants have five (5) ays to file their brief, that the petitioner have five 5) days thereafter within which to file its brief, and at the claimants have five (5) days within which file their brief in reply to petitioner's brief. Fur- er ordered that this matter be continued to March 1, 1938, for further hearing. [104]

Title of District Court and Cause.]

MEMORANDUM

This cause having been heretofore tried and sub- itted to the Court for consideration and decision nd the same being now fully considered, the Court inds that Petitioner, Union Dredging Company, vas free from negligence toward Earl Brashear, husband and father of the respective claimants;

It is ordered that a decree be entered herein in favor of petitioner and against claimants upon find- ngs of fact and conclusions of law to be prepared nd filed pursuant to the Rules of this Court, and hat each party pay its own costs.

Dated: April 25, 1938.

MICHAEL J. ROCHE
United States District Judge

[Endorsed]: Filed Apr. 25, 1938. [105]

[Title of District Court and Cause.]

FINDINGS OF FACT

I.

That at all times herein mentioned petitioner, Union Dredging Company, a corporation, was and now is a corporation duly organized and existing under and by virtue of the laws of the State of California, and having its principal office and [106] place of business in the City and County of San Francisco, State of California.

II.

That at all times herein mentioned said petitioner was the sole owner and operator of the dredger "Carson", her machinery, tackle, apparel, furniture and appurtenances.

III.

That on or about the 17th day of May, 1934, said Dredger was afloat in the navigable waters of San Francisco Bay and was engaged in dredging operations near Hamilton Point, Marin County, California, in the course of a voyage which commenced on or about the 9th day of May, 1934, and which ended on or about the 28th day of May, 1934, at McNear's Point, in San Francisco Bay; that at all times on said day, and on and during said voyage, said dredger was properly manned, equipped and supplied, and was in all respects staunch and seaworthy.

That at no time did said petitioner negligently fail to maintain said vessel as a reasonably safe

lace on which seamen aboard could do their work, r negligently fail to equip said dredger and supply with safe means, materials, appliances or devices n and for the performance of the work to be done, r negligently fail to provide a suitable life boat, fe preserver, or life ring to be used for the rescue f any person going overboard or any other device or the rescue of such pesons.

IV.

That on or about said 17th day of May, 1934, one Earl Brashear was employed upon the said dredger, which was then afloat in the navigable waters of San Francisco Bay, in the course of the said dredging operations and voyage; that at the same time nd place the said Earl Brashear jumped overboard from said [107] dredger and was drowned; hat the death of said Earl Brashear was proximately caused by his own fault and intentional act, n that said Earl Brashear intentionally jumped overboard from said dredger and committed sucide.

That at no time did said petitioner, through its ervants, agents or employees, or otherwise, have full knowledge of the condition of said Earl Brashear or of the extent, seriousness or dangerous character thereof, or that there was any danger that he would jump overboard.

That at no time did said petitioner negligently or carelessly fail to take precautions to remove said Earl Brashear from said dredger to land, or negligently or carelessly fail to place said Earl Brashear

in a safe place on said dredger, or negligently or carelessly fail to prevent the happening of an accident or the death of said Earl Brashear, or negligently or carelessly permit said Earl Brashear to jump overboard, and at no time was said petitioner negligent or careless in attempting to rescue said Earl Brashear.

V.

That at the time said Earl Brashear was drowned on or about the 17th day of May, 1934, and prior to and during said voyage and dredging operations said dredger was in all respects seaworthy and in a thoroughly efficient state of hull, gear, and equipment, and was properly manned, equipped and supplied; that said petitioner used due care and diligence prior to the commencement of said voyage and prior to the commencement of said dredging operations to make said dredger in all respects seaworthy and properly manned, equipped and supplied, and the death of said Earl Brashear was due solely to his own wilful and [108] intentional act, and said petitioner is not in any way accountable or responsible therefor.

VI.

That as the petitioner is exempt from all liability to the claimants and to each of them, it is unnecessary to make any finding regarding the value of the dredger or her machinery, tackle, apparel, furniture or appurtenances; that at the termination of said voyage there was no freight pending on said dredger.

VII.

That the death of said Earl Brashear was occasioned and occurred entirely without any fault or privity or knowledge on the part of said petitioner, and without any fault or negligence on the part of any of its agents, servants or employees, and was not the proximate result of any negligence of said petitioner.

VIII.

That the following actions were brought against said petitioner with respect to claims arising out of said voyage:

An action at law in the Superior Court of the State of California, in and for the City and County of San Francisco, numbered 251994 therein, brought by claimant Hazel Brashear for herself and on behalf of claimant Richard Brashear and claimant Gloria Brashear, her minor children, as plaintiffs, against said petitioner, as defendant, for the recovery of damages for the death of said Earl Brashear, wherein claimant Hazel Brashear prayed for damages in the sum of $25,000, the claimant Richard Brashear prayed for damages in the sum of $10,000, and the claimant Gloria Brashear prayed for damages in the sum of $10,000, or $45,000 in all; [109]

An action at law in the Superior Court of the State of California, in and for the City and County of San Francisco, numbered 265640 therein, brought by claimant Hazel Brashear, administratrix of the estate of Earl Brashear, deceased, as plaintiff, against said petitioner, as defendant, for the recov-

ery of damages for the death of said Earl Brashear, wherein claimant Hazel Brashear prayed for damages in the sum of $25,000, the claimant Richard Brashear prayed for damages in the sum of $10,000, and the claimant Gloria Brashear prayed for damages in the sum of $10,000, or $45,000 in all.

IX.

That clamant Hazel Brashear is the duly appointed, qualified and acting administratrix of the estate of Earl Brashear, deceased; that claimant Hazel Brashear is the widow of said Earl Brashear, and claimants Richard Brashear and Gloria Brashear are the minor children of said deceased and claimant Hazel Brashear; that said claimants are the only surviving dependent relatives left by said deceased.

X.

That in each of the said actions brought in the Superior Court of the State of California, in and for the City and County of San Francisco, said petitioner, in addition to its defenses in said action, petitioned the court for a limitation of liability under and by virtue of law, and claimed the benefits of sections 4283 to 4289 inclusive of the Revised Statutes of the United States, and the amendments thereto, and claimed that its liability should be limited to the value of said petitioner's interest in said dredger, her machinery, tackle, apparel, furniture and appurtenances, together with her freight pending, if any, for the voyage upon which

the death of said Earl Brashear occurred, [110] alleging in support thereof, among other things, that said petitioner was without fault or privity or knowledge in the premises, and that the amount of the claims and demands in each said action greatly exceeded the value and interest of said petitioner in said dredger and her freight pending, if any, at the termination of said voyage.

That in each said action and prior to the time that the action was set for trial the said claimants as plaintiffs therein raised the question of the right of said petitioner to a limitation of liability, and denied, questioned, contested and challenged the right of said petitioner to limit its said liability as therein prayed by petitioner, and as prayed for by petitioner in the above-entitled cause.

Conclusions of Law.

I.

That the death of said Earl Brashear was not caused by any negligence or fault of said petitioner and did not occur with the privity or knowledge of said petitioner.

II.

That said petitioner is entitled to be forever exempted and discharged from liability for any and all loss or damage arising from or growing out of the death of the said Earl Brashear.

III.

That said petitioner is entitled to an injunction perpetually enjoining the claimants, Hazel Bra-

shear, individually and as administratrix of the estate of Earl Brashear, deceased, Richard Brashear and Gloria Brashear, and each of them, from further prosecuting said actions and each said action in the [111] Superior Court of the State of California, in and for the City and County of San Francisco, and from instituting, maintaining or prosecuting any and all actions or proceedings against said petitioner, save and except an appeal from any decree rendered in the above-entitled cause, to recover any loss or damage arising from or growing out of the death of said Earl Brashear.

IV.

That neither said petitioner nor said claimants shall recover costs.

Dated: San Francisco, 1938.

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District Judge.

(Admission of Service)

[Endorsed]: Lodged May 3, 1938. [112]

[Title of District Court and Cause.]

CLAIMANTS' OBJECTIONS AND PROPOSED AMENDMENTS TO PETITIONER'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimants propose the following amendments and make the following objections to the findings of fact and conclusions of law proposed herein by petitioner.

I.

It is requested that the court set out the findings of fact which sustain its jurisdiction. It is apparent that the court has not agreed with petitioner in its various contentions with respect to jurisdiction and the court therefore must have found all the facts necessary to permit it to take jurisdiction and decide [113] the case. We suggest the following in this connection:

(1) Add to paragraph III on page 2, the following:

> "Said dredging operations consisted of widening and deepening an already existing navigable channel from the deeper waters of San Francisco Bay, eastward to Hamilton Point. Said channel was intended for the purpose of navigation and commerce by vessels, particularly vessels connected with the operations of the War Department of the United States. The waters on which the Carson was afloat at all times were navigable and actually navigated by vessels during and prior to the deepening of

said channel. The operations in which the dredger was engaged had a direct connection with navigation and commerce and were not land operations nor in connection with any local matter."

(2) Add the following to paragraph IV on page 3 of the proposed findings:

"Said Brashear was regularly employed by petitioner as a fireman aboard the Carson; said Carson at all times constituted a seaworthy vessel; said Brashear was one of the crew of said vessel; he lived aboard, took his meals and slept on said vessel and at all times was a member of her crew; that he was drowned while in the course of his employment as such seaman; that at all times while so employed he was under the control of and subject to the orders of Dan Forsyth, petitioner's master on board said vessel in charge of operations and in charge of said dredging operations and the representative of petitioner in charge of said operations." [114]

II.

Certain of the proposed findings are contrary to the facts and we suggest that such be eliminated or amended to conform to the testimony.

(1) In paragraph III on page 2, the proposed finding sets out that at no time did petitioner negligently fail to provide a suitable life boat. This is not true, as appears from the uncontradicted testi-

mony. There was no life boat on hand at the time Brashear went overboard. When the life boat was broken two days before instead of getting another life boat, petitioner sent for material to repair the one they had and did not secure another boat until after Brashear was drowned. The findings should correspond with the facts, and we suggest the following in lieu of the present finding:

> "A small flat-bottomed rowboat was a part of the equipment of the Carson when she went on the voyage in question; that the rowboat had been smashed on Tuesday, May 15, 1934, and had not been repaired at the time Brashear went overboard; that petitioner had ample opportunity to get a substitute rowboat, but did not do so until after Brashear was drowned. At the time Brashear went overboard there was no life boat or any other boat which could have been used in an attempt to save his life. At no time were there any life *preserves* on board the dredger, although there was a life ring at the other end of the dredge, but which life-ring was not used at the time Brashear went overboard."

(2) In paragraph IV, top of page 3, there is a proposed finding that the death of Brashear was proximately caused by his own fault [115] and intentional act.

A man out of his mind cannot be said to perform an intentional act. The finding as it stands should be

eliminated and the following should be substituted:

> "At the time Brashear went overboard he was ill. For many hours prior thereto he had been raving and out of his mind, and temporarily deprived of the power to do any intentional act whatever, and he did not know what he was doing at the time he went overboard."

(3) In the same paragraph, next sentence, it is stated that petitioner did not have any knowledge of the condition of Brashear. This is untrue. The court will remember that on at least two occasions, Fancort reported to the captain with respect to Brashear's condition and the question of sending him ashore or tying him up was discussed. This finding should be eliminated and the following substituted to conform with the facts:

> "Prior to the time Brashear jumped overboard and for many hours prior thereto, Brashear was sick, mentally ill, and in a raving condition. Petitioner through its master, Dan Forsyth, knew of this condition but did not think any steps were necessary to prevent his jumping overboard, and did not keep two men to watch him or send him ashore to a hospital."

(4) There should be added to said paragraph IV on page 3, the following:

> "At the time Brashear went overboard said dredger Carson was anchored in the navigable waters of San Francisco Bay opposite Hamilton Field in the port of San Francisco. In the vicinity were many hospitals to which Brashear

could [116] have been sent all night long. There was a launch alongside the dredger which could have been used to send him ashore, but instead of using the launch to send Brashear to a hospital, it was used just before Brashear's death to get water for the next day's operations of the dredger."

(5) The finding contained in paragraph V on page 3 that the death of Brashear was due to his own wilful and intentional act should be eliminated for the same reason as set out in objection to paragraph IV.

(6) In paragraph VI the petitioner states that it is unnecessary to make any finding regarding the value of the dredger or her *machiner*. This is not true because unless the value of the dredger is less than the amount of the claims there is no jurisdiction over the limitation proceeding. The finding also states there was no freight pending at the time of the termination of the voyage. This is untrue. The facts show there was freight pending, consisting of the contract price of the operations performed at Hamilton Field. This paragraph should be eliminated and the following substituted:

"The value of the dredger Carson at the time of the happening aforesaid is the sum of $9500.00. At the time of the termination of the voyage there was certain freight pending in the sum of $1813.05."

III.

Claimant expressly objects and excepts to all findings in favor of petitioner and in respect to all findings against claimant herein. Specifically, claimant objects to all findings which fail to find petitioner guilty of negligence, in failing [117] at all times to keep Brashear properly guarded, in failing to send him ashore to a nearby hospital and in failing to have an effective lifeboat on board at all times. Claimant specifically objects to the finding of lack of negligence contained in paragraphs III, IV and VII of the proposed findings.

IV.

Claimants also object to each and every of the conclusions of law as follows:

(1) That the death of Brashear was not caused by any negligence or fault of said petitioner and did not occur with the privity or knowledge of petitioner and suggests that in lieu thereof a conclusion that

"The death of Brashear was caused by petitioner's negligence and fault."

May 21, 1938.

Respectfully Submitted
HONE & HONE
DERBY, SHARP, QUINBY & TWEEDT
Proctors for Claimants.

(Admission of Service)

[Endorsed]: Lodged May 21, 1938. [118]

[Title of District Court and Cause.]

FINDINGS OF FACT

I.

That at all times herein mentioned petitioner, Union Dredging Company, a corporation, was and now is a corporation duly organized and existing under and by virtue of the laws of the State of California, and having its principal office and [119] place of business in the City and County of San Francisco, State of California.

II.

That at all times herein mentioned said petitioner was the sole owner and operator of the dredger "Carson", her machinery, tackle, apparel, furniture and appurtenances.

III.

That on or about the 17th day of May, 1934, said dredger was afloat in the navigable waters of San Francisco Bay and was engaged in dredging operations near Hamilton Point, Marin County, California, in the course of a voyage which commenced on or about the 9th day of May, 1934, and which ended *or* or about the 28th day of May, 1934, at McNear's Point, in San Francisco Bay; that at all times on said day, and on and during said voyage, said dredger was properly manned, equipped and supplied, and was in all respects staunch and seaworthy. Said dredging operations consisted of widening and deepening an already existing navi-

gable channel from the deeper waters of San Francisco Bay westward to Hamilton Point. Said channel was intended for the purpose of navigation and commerce by vessels, particularly vessels connected with the operations of the War Department of the United States. The waters on which the Carson was afloat at all times were navigable and actually navigated by vessels during and prior to the deepening of said channel. The channel which the dredger was engaged in deepening had a direct connection with navigation and commerce.

That at no time did said petitioner negligently fail to maintain said vessel as a reasonably safe place on which seamen aboard could do their work, or negligently fail to equip said dredge and supply it with safe means, materials, appliances or [120] devices in and for the performance of the work to be done, or negligently fail to provide a suitable life boat, life preserver, or life ring to be used for the rescue of any person going overboard or any other device for the rescue of such persons. A small flat-bottomed rowboat was a part of the equipment of the Carson when she went on the voyage in question; the rowboat had been smashed on Tuesday, May 15, 1934, in an accident and had not been repaired at the time Earl Brashear went overboard, but materials had been procured from the shore for the repair of the boat, and the boat was in the process of being repaired. At the time Brashear went overboard, there was no lifeboat or any other boat which could have been used in an attempt to save his life.

IV.

That on or about said 17th *say* of May, 1934, one Earl Brashear was employed upon the said dredger, which was then afloat in the navigable waters of San Francisco Bay, in the course of the said dredging operations and voyage; that at the same time and place the said Earl Brashear jumped overboard from said dredger and was drowned; that the death of said Earl Brashear was proximately caused by his own fault and intentional act, in that said Earl Brashear intentionally jumped overboard from said dredger and committed suicide.

That at no time did said petitioner, through its servants, agents or employees, or otherwise, have full knowledge of the condition of said Earl Brashear or of the extent, seriousness or dangerous character thereof, or that there was any danger that he would jump overboard.

That at no time did said petitioner negligently or carelessly fail to take precautions to remove said Earl Brashear from said dredger to land, or negligently or carelessly fail to [121] place said Earl Brashear in a safe place on said dredger, or negligently or carelessly fail to prevent the happening of an accident or the death of said Earl Brashear, or negligently or carelessly permit said Earl Brashear to jump overboard, and at no time was said petitioner negligent or careless in attempting to rescue said Earl Brashear.

Said Earl Brashear was regularly employed by the petitioner as a fireman aboard the Carson. Said

Carson at all times constituted a seaworthy vessel. Brashear lived aboard and took his meals and slept on the Carson.

At the time said Earl Brashear went overboard he was ill. For some hours prior thereto he had been raving off and on, and off and on was out of his mind. The master, Dan Forsyth, knew of his condition, but did not think that any steps were necessary to prevent him from jumping overboard. At the time Earl Brashear went overboard the dredger Carson was anchored in the navigable waters of San Francisco Bay opposite Hamilton Field. There were hospitals in San Francisco, Richmond, Berkeley and San Rafael to which Brashear could have been taken during the night. There was a launch alongside the dredger which could have been used to send him ashore.

V.

That at the time said Earl Brashear was drowned on or about the 17th day of May, 1934, and prior to and during said voyage and dredging operations, said dredger was in all respects seaworthy and in a thoroughly efficient state of hull, gear, and equipment, and was properly manned, equipped and supplied; that said petitioner used due care and diligence prior to the commencement of said voyage and prior to the commencement of said dredging operations to make said dredger in all respects sea- [122] worthy and properly manned, equipped and supplied, and the death of said Earl Brashear was due solely to his own wilful and intentional act, and

said petitioner is not in any way accountable or responsible therefor.

VI.

That the value of the dredger Carson at the time of the happening aforesaid was the sum of $9500.00. The gross proceeds of the voyage amounted to $1813.25, all of which amount was disbursed in expenses of the voyage excepting the sum of $145.00, which was the net income of the voyage.

VII.

That the death of said Earl Brashear was occasioned and occurred entirely without any fault or privity or knowledge on the part of said petitioner, and without any fault or negligence on the part of any of its agents, servants or employees, and was not the proximate result of any negligence of said petitioner.

VIII.

That the following actions were brought against said petitioner with respect to claims arising out of said voyage:

An action at law in the Superior Court of the State of California, in and for the City and County of San Francisco, numbered 251994 therein, brought by claimant Hazel Brashear for herself and on behalf of claimant Richard Brashear and claimant Gloria Brashear, her minor children, as plaintiffs, against said petitioner, as defendant, for the recovery of damages for the death of said Earl Brashear, wherein claimant Hazel Brashear prayed for damages in the sum of $25,000, the claimant Richard

Brashear prayed for damages in the sum of $10,000, and the claimant Gloria Brashear prayed for damages in the sum of $10,000, or $45,000 in all; [123]

An action at law in the Superior Court of the State of California, in and for the City and County of San Francisco, numbered 265640 therein, brought by claimant Hazel Brashear, administratrix of the estate of Earl Brashear, deceased, as plaintiff, against said petitioner, as defendant, for the recovery of damages for the death of said Earl Brashear, wherein claimant Hazel Brashear prayed for damages in the sum of $25,000, the claimant Richard Brashear prayed for damages in the sum of $10,000, and the claimant Gloria Brashear prayed for damages in the sum of $10,000, or $45,000 in all.

IX.

That claimant Hazel Brashear is the duly appointed, qualified and acting administratrix of the estate of Earl Brashear, deceased; that claimant Hazel Brashear is the widow of said Earl Brashear, and claimants Richard Brashear and Gloria Brashear are the minor children of said deceased and claimant Hazel Brashear; that said claimants are the only surviving dependent relatives left by said deceased.

X.

That in each of the said actions brought in the Superior Court of the State of California, in and for the City and County of San Francisco, said petitioner, in addition to its defenses in said action, petitioned the court for a limitation of liability

under and by virtue of law, and claimed the benefits of sections 4283 and 4289 inclusive of the Revised Statutes of the United States, and the amendments thereto, and claimed that its liability should be limited to the value of said petitioner's interest in said dredger, her machinery, tackle, apparel, furniture and appurtenances, together with her freight pending, if any, for the voyage upon which the death of said Earl Brashear [124] occurred, alleging in support thereof, among other things, that said petitioner was without fault or privity or knowledge in the premises, and that the amount of the claims and demands in each said action greatly exceeded the value and interest of said petitioner in said dredger and her freight pending, if any, at the termination of said voyage.

That in each said action and prior to the time that the action was set for trial and said claimants as plaintiffs therein raised the question of the right of said petitioner to a limitation of liability, and denied, questioned, contested and challenged the right of said petitioner to limit its said liability as therein prayed by petitioner, and as prayed for by petitioner in the above-entitled cause.

Conclusions of Law.

I.

That the death of said Earl Brashear was not caused by any negligence or fault of said petitioner and did not occur with the privity or knowledge of said petitioner.

II.

That said petitioner is entitled to be forever exempted and discharged from liability for any and all loss or damage arising from or growing out of the death of the said Earl Brashear.

III.

That said petitioner is entitled to an injunction perpetually enjoining the claimants, Hazel Brashear, individually and as administratrix of the estate of Earl Brashear, deceased, Richard Brashear and Gloria Brashear, and each of them, from [125] further prosecuting said actions and each said action in the Superior Court of the State of California in and for the City and County of San Francisco, and from instituting, maintaining or prosecuting any and all actions or proceedings against said petitioner, save and except an appeal from any decree rendered in the above-entitled cause, to recover any loss or damage arising from or growing out of the death of said Earl Brashear.

IV.

That neither said petitioner nor said claimants shall recover costs.

Dated: San Francisco, 25th May, 1918.

MICHAEL J. ROCHE
District Judge.

Approved as to Form, as Provided in Rule 22.

DERBY, SHARP, QUINBY & TWEEDT
HONE & HONE

[Endorsed]: Filed May 25, 1938. [126]

In the Southern Division of the United States District Court, in and for the Northern District of California.

No. 22399-R. In Admiralty.

In the Matter of the Petition of

UNION DREDGING COMPANY,
a corporation,

former owner of the dredger "Carson", her machinery, tackle, apparel, furniture and appurtenances, for limitation of and exemption from liability.

FINAL DECREE

A verified petition having been filed in this Court on December 23, 1936, by the Union Dredging Company, a corporation, praying for a limitation of and exemption from liability with respect to any loss, injury, damage, destruction or death, and particularly with respect to the death of Earl Brashear, arising out of or occasioned during a voyage of the dredger "Carson" which commenced on or about the 9th day of May, 1934, and which ended on or about the 28th day of May, 1934, in San Francisco Bay, California;

And an order having been duly made and entered referring the matter to the Honorable Ernest E. Williams, United States Commissioner, for the purpose of making an appraisement of the value of the interest of petitioner in the dredger "Carson" [127] and her freight pending, if any, and the said

Commissioner having thereafter reported that the interest of petitioner in said dredger "Carson", her machinery, tackle, apparel, furniture and appurtenances was the sum of $9500.00 at the time of the termination of the said voyage;

And petitioner having thereafter duly filed an approved stipulation for the appraised value of said dredger in the said sum of $9500.00, together with interest and costs;

And an order having been duly made and entered directing that a Monition issue against all persons claiming damages for any loss, injury, damage, death or destruction, arising out of or occasioned during the said voyage of the dredger "Carson", citing them to appear before this Court and make due proof of their respective claims on or before the 30th day of September, 1937, before the Honorable Ernest E. Williams, United States Commissioner;

And said Monition having been duly issued by the Clerk of the above entitled court on August 27, 1937, and a Citation and Notice of Monition having been duly posted and published in the manner required by law and the rules of this court;

And upon the return of said Monition proclamation having been duly made for all persons claiming damages for any loss, injury, damage, death or destruction arising out of or occasioned during the said voyage of the dredger "Carson", to appear and answer the said petition for limitation of and exemption from liability, and to present their claims; and Hazel Brashear, as administratrix of

he estate of the said Earl Brashear, deceased, on behalf of herself personally and on behalf of her minor children, Richard Brashear and Gloria Brashear, having presented a claim for damages for he death of said Earl Brashear in the total sum of 345,000.00, and having answered [128] said petition for limitation of and exemption from liability, denying that petitioner was entitled to a limitation of or exemption from liability; and no other person having appeared or presented any claim, and the defaults of all other persons having been duly entered;

And the above entitled cause having duly and regularly come on for trial on the pleadings and proofs of the petitioner and of said claimant, Hazel Brashear, administratrix of the estate of Earl Brashear, deceased, on behalf of herself personally and on behalf of her minor children, Richard Brashear and Gloria Brashear, said petitioner being represented by its proctors, Jewel Alexander, Esq., appearing for Redman, Alexander & Bacon, and James M. Wallace, Esq., and said claimants being represented by their proctors, Joseph C. Sharp, Esq., and Charles Hemmings, Esq., appearing for Derby, Sharp, Quinby & Tweedt, and Hone & Hone; and evidence having been adduced and the cause having been argued by the proctors for the respective parties, and briefs having been thereafter filed by said proctors, the cause was submitted to the Court for its decision; and the Court having ordered that a decree should be rendered in favor

of the petitioner exempting it from liability, and findings of fact and conclusions of law having been duly made and entered by the Court, now, therefore

It Is Hereby Ordered, Adjudged and Decreed

(1) That the death of said Earl Brashear was not caused by any negligence or fault of petitioner, Union Dredging Company, a corporation, and did not occur with the privity or knowledge of said petitioner;

(2) That said petitioner be and it hereby is forever exempted and discharged from liability for any and all loss or damage arising from or growing out of the death of the said [129] Earl Brashear, and for any and all loss, injury, damage, death or destruction arising out of or occasioned during the voyage of the dredger "Carson" which commenced on or about the 9th day of May, 1934, and which ended on or about the 28th day of May, 1934, in San Francisco Bay, California;

(3) That the claimant Hazel Brashear, individually and as administratrix of the Estate of Earl Brashear, deceased, and Richard Brashear and Gloria Brashear, and each of them, are hereby perpetually enjoined from further prosecuting that certain action at law in the Superior Court of the State of California, in and for the City and County of San Francisco, numbered 251994 therein, brought by the said Hazel Brashear for herself and on behalf of Richard Brashear and Gloria Brashear, her minor children, as plaintiffs, against said petitioner, as defendant, for the recovery of damages

or the death of said Earl Brashear, and that certain action at law in the Superior Court of the State of California, in and for the City and County of San Francisco numbered 265640 therein, brought by the said Hazel Brashear, administratrix of the estate of Earl Brashear, deceased, as plaintiff, against said petitioner, as defendant, for the recovery of damages for the death of said Earl Brashear, and from instituting, maintaining or proseuting any and all actions or proceedings against said petitioner, save and except an appeal from the final decree rendered herein, to recover any loss or damage arising from or growing out of the death of said Earl Brashear.

(4) That neither said petitioner nor said claimants shall recover costs herein.

Dated: San Francisco, California, May 29, 1938.

MICHAEL J. ROCHE
District Judge.

Approved as to form as provided in Rule 22.

DERBY, SHARP, QUINBY & TWEEDT
HONE & HONE
Proctors for claimants.

Entered in Vol. 30 Judg. and Decrees at Page 865-866.

[Endorsed]: Filed May 31, 1938. [130]

[Title of District Court and Cause.]

Friday, March 11, 1938.

Appearances:

For Petitioner:

James M. Wallace, Esq.

Jewel Alexander, Esq.

For Claimant Hazel Brashear, etc., et al.:

Joseph C. Sharp, Esq.

Donald Lobree, Esq.

Charles Hemmings.

EDWARD F. HAAS,

Called for the Petitioner; Sworn.

Mr. Wallace: Q. Mr. Haas, during the year 1934, what connection did you have with the Union Dredging Company, a corporation?

A. I was the President and Manager.

Q. Had you been connected with that corporation for some time before that?

A. Yes, since about 1907.

Q. And in 1934 you were a stockholder, were you?

A. Yes.

Q. Were there any other stockholders besides yourself?

A. There was one, yes.

Q. And what proportion of the stock did this other stockholder own?

(Testimony of Edward F. Haas.)

A. He owned one-third and I owned two-thirds.

Q. Who were the officers of the corporation in 1937 besides yourself?

A. My brother was vice-president and Mr. Ruthroff was the [133] Secretary.

Q. Did Mr. Ruthroff have any shares other than qualifying shares?

A. That is all.

Q. And what were his duties in connection with the corporation?

A. Clerical.

Q. Keeping the books and that sort of thing?

A. Yes.

Q. Who was the Vice-President at the time?

A. Mr. Merrill.

Q. He was the owner of the one-third interest in the stock?

A. Yes.

Q. Did Mr. Merrill have anything to do with the management or operation of the Dredge "Carson"?

A. Nothing at all.

Q. Did Mr. Ruthroff, as Secretary, have anything to do with the management or operation of the Dredge "Carson"?

A. No, simply the fulfilling of the orders.

Q. Who was the officer who was in charge?

A. I was the one who took care of all the matters.

Q. You were the one who had charge of the operation of the Dredge "Carson"?

(Testimony of Edward F. Haas.)

A. Yes.

Q. That was owned by the Union Dredging Company, a corporation, in 1934, was it?

A. Yes.

Q. Mr. Haas, who was the captain of the "Carson" in 1934?

A. Captain Daniel Forsyth.

Q. How long had he been employed by the Union Dredging Company?

A. Over twenty years.

Q. Did you have anything to do with employing him when he was first employed?

A. Yes, I selected him.

Q. What experience had Captain Forsyth had with respect to operating dredges of the type of the "Carson"?

A. He had had considerable experience before I employed him; I got him on the recommendation of a number of men; he was an exceptionally good captain; he was with me for years; he was with me up to the time we sold the dredge; as a matter of fact, he is now employed in the same capacity [134] by the people to whom I sold the dredge.

Q. By the people to whom you sold the dredge

A. Yes.

Q. This dredge was sold, was it not, shortly after the death of Earl Brashear?

A. Yes, after this particular job.

Q. In your opinion, Mr. Hass, was Captain Forsyth in 1934 a competent captain of a dredge of this particular type?

(Testimony of Edward F. Haas.)

A. Absolutely so.

Q. Was Captain Forsyth the captain of the "Carson" at the time the Dredge "Carson" commenced a voyage from San Francisco on or about May 9, 1934?

A. Yes.

Q. Which ended at McNear's Point on or about May 28, 1934?

A. Yes.

Q. This voyage was in connection with the building of Hamilton Field, was it not, in Marin County?

A. It was in connection with a channel which was being dredged through the mud flats, from the navigable waters through the mud flats to the edge of Hamilton Field, so that they could bring freight in on barges through this channel; otherwise there was a mud flat there which was not navigable except at extremely high tide.

Q. Was Captain Forsyth familiar with the particular type of work which the Dredge was doing at Hamilton Field?

A. Yes, he had done a lot of it.

Q. Now, was Captain Forsyth in charge of maintaining the dredge and keeping it in order?

A. Yes, he had full charge of it.

Q. Was he in charge of manning the dredge, that is, employing the personnel on board?

A. Yes, he employed them, himself, or we would send them over from the office.

Q. Was he in charge of equipping and supplying the dredge with proper equipment?

(Testimony of Edward F. Haas.)

A. Yes. He would do that directly or send in orders to the office for the supplies.

Q. Did you have confidence in his recommendations in that respect?

A. Absolutely.

Q. Did he have charge of any inspections that were necessary of the [135] condition of the dredge from time to time?

A. Yes, it was his duty to see it was kept up.

Q. Did you make any general inspection of the "Carson" shortly before she left San Francisco on or about May 8, 1934?

A. Yes, I was on the dredge quite a bit. In the first place, she was in San Francisco, close by, and it was easy to go there, and when it went to Hamilton Field I also went over once or twice a week.

Q. Before the time that she left San Francisco on or about May 8, 1934, to go up to Hamilton Field, had the dredge "Carson" had any overhauling or repairs made?

A. Yes, she had been—while she was here in San Francisco we had some damage done to the A-frame and on that account I took her over to Crowley's shipyard and had her thoroughly overhauled, I had all the repairs made, had her caulked, and she was in first-class condition when she came off the ways on April 17.

Q. 1934?

A. 1934.

Q. When she left San Francisco to go up to Hamilton Field on or about May 9, 1934, would you

(Testimony of Edward F. Haas.)

say that the Dredge "Carson" was fitted for the work to which she was put and in which she formerly was——

A. Yes.

Q. Was she at that time properly manned, equipped and supplied?

A. Yes.

Q. Mr. Haas, when did you first hear of the death of Earl Brashear?

A. I went out to the dredge the very morning when he was drowned, or the next day, I could not recall which. My diary shows I was there on the 17th, and it was not until I got aboard that I heard that there was any accident whatever.

Q. When you got on board the dredge you heard about Earl Brashear's death?

A. Yes.

Q. Until that time, that is, when you heard about his death, did you [136] know whether or not he was employed by the Union Dredging Company on the "Carson"?

A. I never knew of him or heard of him, or knew that there was such a person.

Q. Before learning of his death did you know anything about the circumstances connected with his death?

A. No.

Q. Did you know at that time who had hired him?

A. No.

(Testimony of Edward F. Haas.)

Q. To work on the dredge?

A. No.

Q. Before you learned of his death did you know in what capacity he was hired on the dredge?

A. No, I knew nothing about it.

Q. Before his death did you know whether or not he lived on board the dredge?

A. No.

Q. Before learning of his death did you know whether he was subject to any mental disorder?

A. No, I never did; afterwards, of course, I learned that he was addicted to drink.

Mr. Sharp: I object to anything—he cannot testify to anything beyond his knowledge.

Mr. Wallace: Q. Mr. Haas, before learning of his death did you know whether or not he drank intoxicating liquor to excess?

A. No, I never knew that.

Q. Before learning of his death did you know anything at all about his mental capacity?

A. Nothing, whatever.

Q. Before learning of his death on that occasion did you know whether or not he was subject to delirium tremens?

A. No.

Q. Before learning of his death on that occasion did you know whether or not he was irresponsible and unable to control his actions or conduct?

A. No.

Q. Before learning of his death did you know anything about the circumstances of his death?

(Testimony of Edward F. Haas.)

A. No, it was all news to me up to the time I got on the dredge.

Q. Mr. Haas, did you at any time know of your own knowledge whether [137] Brashear could have been removed from the dredge to shore before the time that he was said to have jumped overboard?

A. Well, I know what might have been done.

Q. Do you know of your own knowledge at any time——

A. Not previous to his death, no.

Q. Did you know at any time whether or not Brashear could have been restrained from jumping overboard?

A. No knowledge of the case, at all.

Q. Did you at any time know of your own knowledge whether or not there was any negligence on the part of Captain Forsyth?

A. No.

Q. In permitting Brashear to jump overboard?

A. No.

Q. Did you at any time of your own knowledge know whether there was any negligence on the part of any other employee of the dredge in permitting him to jump overboard?

A. No.

Q. Did you at any time know of your own knowledge what means were used to attempt to rescue Brashear after he had jumped overboard?

A. I know what was done afterward.

Q. Did you at any time know of your own knowledge what was done?

(Testimony of Edward F. Haas.)

A. Oh, no.

Q. Just what you heard afterward?

A. Yes.

Q. Mr. Haas, was there a small boat on board of the dredge at the commencement of this voyage?

A. Yes.

Q. Was it in good condition at the commencement of this voyage?

A. Yes.

Q. Did you have any knowledge, before the time you learned of Brashear's death as to whether or not that boat was in good condition at the time he jumped overboard?

A. No, I learned of it afterward.

Q. You ascertained afterward?

A. Yes, I ascertained afterward that it was wrecked the night before.

Mr. Sharp: I ask that what he learned afterward go out.

The Court: It may go out. [138]

Mr. Wallace: Do you know of any law or statute that requires a dredger of this type to carry a lifeboat or a small boat?

Mr. Sharp: I object to that on the ground it is immaterial, irrelevant, and incompetent. If there is a law his knowledge or ignorance of it is immaterial, and as a matter of fact in this particular respect it is the duty to require proper equipment independent of statute. If your Honor wishes any argument on that I would be glad to present it to you.

(Testimony of Edward F. Haas.)

The Court: I will sustain the objection on the ground the proper foundation has not been laid.

Mr. Wallace: Q. Mr. Haas, do you know whether there was a life preserver or a life ring on board the "Carson" at the commencement of this voyage?

A. I could not say positively, but I can say there has always been a life preserver on that dredge which I have seen many times, and I see no reason why it should not be on at that time. I cannot say positively that I was on board the dredge and saw that life preserver the day it started out; neither can I say a lot of things that I presume are carried, even in my own house, or in my own rooms, I expect them to be there, and, therefore, they should be there.

Mr. Sharp: I ask that that all be stricken from the record, all of his statements as to what ought to be there and what he presumed.

The Court: He said he did not know personally. Proceed.

Mr. Wallace: Q. Had you seen a life preserver there on other occasions?

A. Many times.

Mr. Sharp: I ask that that go out. It does not make any difference whether there were life preservers there on other occasions. We are only interested in this particular occasion.

The Court: I will allow it to stand.

(Testimony of Edward F. Haas.)

Mr. Wallace: Q. Do you know of any law or statute requiring a [139] dredge of this type to carry life preservers?

A. No, I do not.

Mr. Sharp: The same objection.

The Court: I will sustain the objection on the ground the proper foundation has not been laid.

Mr. Wallace: Q. Did you at any time know of any condition on board the Dredge "Carson" with respect to equipment or appliances which might have caused the death of Earl Brashear?

A. None, whatever.

Mr. Wallace: You may cross-examine.

Cross-Examination.

Mr. Sharp: Q. Mr. Haas, as I remember your testimony you said that you did not know whether or not during the month of May, 1934, the "Carson" had any life preservers or life rings on board: is that correct?

A. Yes, I did not know positively on that particular day; I did not have that in mind, I did not go aboard to examine it for that. I knew there were life preservers there before. I had seen them dozens of times.

Q. You don't know whether it was there at this time?

A. I could not say positively, no.

Q. Did you look for any when you were on board the dredge?

(Testimony of Edward F. Haas.)

A. No, I presumed it was there, I had every reason to presume that it was there.

Q. You did not feel obligated to look to see whether there was any there or not?

A. No, because it had been there. I want to say that it had been provided, had been there for years, and there was no reason in the world why I should suspect it was not there on that particular day.

Q. But regardless of that, you don't know whether it was there at all during the month of May?

A. No.

Q. You did not look for it, yourself, and you did not delegate anyone [140] to look into the question of life preservers?

A. I did not consider it necessary.

Q. You did not consider it necessary to have anyone look into the question of life preservers or life rings?

A. I presumed it was there, it had been there every time I looked for it, and there was no reason why it should not be there on that particular day.

Q. I am not talking about any particular day, I am talking about the whole month of May.

A. I am satisfied in my own mind it was there, but I could not swear to it.

Q. As a matter of fact, this dredge was rather an old dredge, was it not?

A. Fairly so. It was about 20 years old, or a little more.

(Testimony of Edward F. Haas.)

Q. The hull was not in a very good state of preservation during the year 1934?

A. The hull had teredos; in fact, most every boat has, but it was perfectly safe for that job over there, because it was on a soft mud bank.

Q. The hull leaked pretty badly, did it not?

A. No, it did not, it was just off the dry dock. It had leaked previous to that, but it was right off the dry dock, it had not been working more than a week since then.

Q. Do you remember testifying before the Commissioner in this matter?

A. Yes.

Q. Didn't you at that time tell him the hull was not in a good state of preservation?

Mr. Wallace: I suggest that the witness be shown his testimony if he is to be examined with respect to such testimony.

Mr. Sharp: I have no objection to doing that; I have only my notes of that. I will be glad to show Mr. Haas his testimony.

Q. I call your attention to your testimony on page 8, commencing the [141] third line from the bottom, and ask you to read that and I will ask you if you did not testify to the effect that is set out at that time and place?

A. "Q. Was the hull in good preservation in 1934? A. Not very good. Q. Were there any leaks in the dredge? A. Yes, it leaked pretty bad, the bottom was full of teredos." That is correct.

Q. What you said at that time was true?

(Testimony of Edward F. Haas.)

A. Yes, it had been, but after we had had these repairs made just a month previous, and the leaks were caulked.

Q. Let me call your attention to the fact that at this time you were testifying as to the condition of the dredge in response to questions from your counsel, as of May, 1934, at the time this vessel was up there. The purpose of this proceeding was to fix the value of the dredge in May, 1934, and you were testifying with respect to that. Otherwise there would have been no point to the testimony at all.

Mr. Wallace: That question assumes certain things not in evidence. The witness testified before the Commissioner in response to certain questions, but if he is to be examined I suggest he be examined with reference to the particular questions that were asked.

Mr. Sharp: That is the fact, that the purpose of that proceeding was to fix the value of the vessel as of May, 1934. Now, I call your attention to the question at the top of page 9, and ask you whether you did not at that time testify as follows:

"Q. You did not have any trouble, however, in using it?

"A. Yes, it needed caulking all right."

A. Yes, that is true, in the way it was in 1934 it did need caulking, it needed caulking a month previous.

Q. Then you were asked this question:

"Q. Were the machinery and boilers in good condition?"

(Testimony of Edward F. Haas.)

And your answer was:

"A. Pretty fair, nothing extra."

A. Yes. It was old machinery, but it was in working condition. [142]

Q. I call your attention to your testimony on the top of page 14, and ask you whether or not you at that time said that you were always ashamed of this boat, this dredge?

A. I was ashamed of the house. The house was built by a house carpenter. The house was built like a stable. Charles Warren supervised the building of the house, and it looked like a barn.

Q. How old were the engines on this dredge?

A. I could not say; they were on there when it was first built.

Q. Do you remember testifying before the Commissioner they were 20 or 22 years old, that you got the engines second hand and at that time they were very old and must have been pretty close to 40 years old?

Mr. Wallace: We will object to this, it is not proper cross-examination here. There is nothing here that has any connection with the death of Earl *Brasher*. This testimony is all before the Court and in the form of a transcript taken before the Commissioner, and certainly it would not be proper cross-examination of this witness on this proceeding.

Mr. Sharp: The answer to that is this: The petition alleges this vessel was seaworthy in all respects,

(Testimony of Edward F. Haas.)

and the witness has testified along the same lines. I am entitled on cross-examination to show that notwithstanding these general statements that the fact is that the vessel was not seaworthy. So much as to proper cross-examination. As to the question whether it is relevant or not, the thing comes down to a point of law. It is our contention on the facts of the case if a vessel is not seaworthy at all that the Petitioner is not entitled to limitation.

(After argument.)

The Court: I will allow the testimony to go in subject to your objection.

A. That may all be true, but it does not admit that the ship is [143] unseaworthy. I think you will find nothing in my previous testimony that admits that it was unseaworthy.

Mr. Sharp: I am not trying to ask for your general conclusion. I am just asking you about the engines.

A. I am trying to explain my testimony. You are trying to prove by me that the dredge was unseaworthy, it is not so.

Q. Might I ask very respectfully for you to answer my question with respect to the engines?

The Court: Answer the question.

A. That answers it. May I continue with my explanation?

Mr. Sharp: I think he ought to answer the question before he gives his explanation. What is your answer to the question?

(Testimony of Edward F. Haas.)

A. With respect to the second-hand condition of the engine and their age, the engines are old but that does not mean that they are unseaworthy.

Q. As a matter of fact, you bought them second hand in 1907?

A. That is perfectly all right; they probably needed repair and they had been repaired.

Q. They were over 40 years old?

A. That is quite true, but some equipment 40 years old is better than modern equipment.

Q. As a matter of fact, this dredge at this particular time was full of teredos, was it not?

A. It was in the bottom, and that testimony was given to show that sooner or later the bottom would have to be repaired. It did not prove that it was unseaworthy at all.

Q. As a matter of fact, you did testify and it is true that the bottom was honeycombed with teredos and the four inch tanks had only about an inch left of sound wood?

A. That is true, but working on soft ground over there at Hamilton Field it made no difference whatsoever.

Q. While it would have been safe to have that boat on soft ground [144] it would not have been safe anywhere else?

A. Not on rocks, certainly.

Q. Any sort of a crack would have gone through that bottom?

A. It would have gone through. This testimony was given in order to demonstrate the value of the

(Testimony of Edward F. Haas.)

hip at that time, what we said it was. It simply heant that sooner or later you would have to re-air the thing, have to repair the engine and all that ort of thing, but they were acting properly at the ime.

Q. You spoke in your petition and in your testi-nony—you referred to this dredge as being on a oyage. What do you mean by a voyage? A dredge loes not sail from port to port like an ordinary hip, does it?

A. It is towed.

Q. As a matter of fact, it had no motive power f its own?

A. No.

Q. It did not go from port to port, at all?

A. No.

Q. It never went out to sea, did it?

A. No, it went around the bay and up the river —it went up and down the river.

Q. Instead of being on a voyage on its own account, it went wherever it was taken: isn't that a correct statement?

A. Just like a barge.

Q. Did the dredge have regular ports of call like a ship?

A. She called wherever she had a job.

Q. You mean she called wherever she was towed?

A. That is it, exactly.

Q. During the month of May where was the dredge "Carson"?

(Testimony of Edward F. Haas.)

A. Part of the time it was over at Hamilton Field.

Q. And she floated over there?

A. She had been towed over there.

Q. But she was towed there over the water?

A. Yes.

Q. And what was she doing there at the time?

A. Dredging a channel for the Government.

Q. And that channel was intended to increase the navigability to Hamilton Field?

A. Yes. [145]

Q. To give the channel navigability to Hamilton Field?

A. Yes.

Q. That channel was intended to be used by vessels coming from the port of San Francisco to take cargo to Hamilton Field?

A. I presume so.

Q. Now, was your vessel working at that time under a contract with somebody?

A. Yes.

Q. With whom?

A. That was under a subcontract, with the Dutton Dredging Company.

Q. What was your compensation for the work you did there in the month of May?

Mr. Wallace: We will object to that as not proper cross-examination.

Mr. Sharp: It is part of the petitioner's case in a limitation proceeding to show that its pending

(Testimony of Edward F. Haas.)

freight is of a certain amount of value, and one of the issues set forth in the petition is that there was no freight pending. Whether it is proper cross-examination or not I would like to ask that question and make Mr. Haas my own witness, because it is one of the issues on a limitation proceeding.

The Court: It has to do with the order of proof. It is not cross-examination.

Mr. Wallace: That question was referred to the Commissioner and he filed his report, and it was affirmed by the Court.

Mr. Sharp: The report of the Commissioner made no reference whatever to the question of freight pending. I have read that report very carefully and there is no finding, and nothing is shown with respect to the freight pending.

The Court: I will allow it subject to a motion to strike.

Mr. Wallace: May we have an exception?

The Court: I am only giving you an opportunity to have a record. Proceed. [146]

A. Well, I cannot say off-hand without consulting the books.

The Court: He wants your present knowledge if you have any.

A. Well, from the 9th to the 28th is 19 days; taking three Sundays out of it that would be 16 days. We had several storms in which we could not work. I should somewhere around $1000 or $1300.

Mr. Sharp: Would you be able to fix the amount exactly by some books under your control?

(Testimony of Edward F. Haas.)

A. Oh, yes, sure.

Q. Would it be too much to ask you to produce those books this afternoon or to refresh your memory? I will take your word on it if you will refresh your memory and testify to it this afternoon.

A. I think we can figure it out.

Q. By the way, do you know whether Captain Forsyth holds any papers or not?

A. No, I do not.

Q. He does not need any papers on the vessels of this character?

A. Not on a dredger; they have never been required to have papers.

Q. Who is in charge of the operation of your dredger when you are not present?

A. Captain Forsyth.

Q. He had authority to do things on his own account?

A. If he did not have time to wait to phone for them he had authority to go ahead and do them.

Q. Was he authorized to move the vessel from place to place?

A. Certainly.

Q. Was he authorized to make contracts on your behalf for dredging work?

A. In small matters, yes; in large matters naturally he would refer them to me.

Q. Did you have any marine superintendent?

A. I had Captain Forsyth.

Q. Forsyth was your Marine Superintendent?

(Testimony of Edward F. Haas.)

A. Well, you might call him that, we called him captain.

Q. But regardless of the title you called him so far as you had a marine superintendent in charge of operations that was Captain Forsyth? [147]

Mr. Wallace: We will object to that as calling for the conclusion of the witness.

A. We never dignified him with that name, and don't know of anybody else who calls a captain marine superintendent.

Q. He was the superintendent of your operations regardless of what title you dignified him with?

Mr. Wallace: That is assuming a fact not in evidence.

Mr. Sharp: I am trying to find out who actually was in charge of the operations.

Q. Regardless of whether you call him superintendent or not, he was the man in charge of operations, is that correct?

A. Yes.

Q. Captain Forsyth was in charge of your operations?

A. He was.

Q. As the person in charge of your operations, if there was anything to be done it was his job to do it?

A. Yes.

Q. Now, as I understand your testimony you

(Testimony of Edward F. Haas.)

said you never saw Mr. Brashear in his lifetime, is that correct?

A. I never did.

Q. I am not going to argue with you, Mr. Haas, but my information is you were present when Mr. Brashear was hired, and that you took him to the boat. I will tell you frankly what I have in mind. I want to show you what I believe is a picture of his and ask you if you have ever seen Mr. Brashear or not.

Mr. Alexander: Are you seriously contending that Mr. Haas was there when he was hired?

Mr. Sharp: Yes. We have a witness here that will testify Mr. Haas took Mr. Brashear up there.

A. That isn't so, that is all.

Q. You may be mistaken, so I am just trying to look into the matter.

A. I am not mistaken.

Q. Have you ever seen that man who is portrayed in that picture?

A. I never saw him in my life.

Mr. Sharp: Mr. Fancort, will you stand up? Have you ever [148] seen this gentleman before, Mr. Haas?

A. Yes, I have seen the gentleman.

Q. Do you remember an occasion before Mr. Brashear died in which you were in an automobile with Mr. Fancort and Mr. Brashear?

A. I have no recollection whatever; he might have been there without my knowing who he was or anything about it.

(Testimony of Edward F. Haas.)

Q. You remember the Monday before Mr. Brashear's death riding up in an automobile up to Hamilton Field or up to where the dredge was with Mr. Fancort, a State Inspector, and another man?

A. No, I have no recollection of it. That was the Monday before the day that he was drowned?

Q. Yes. Let me ask you this, Mr. Brashear met his death on Thursday, May 17th. Were you up to the dredge at or about that time, or immediately prior thereto?

A. I have got a diary. On Sunday the 13th I was home, on Monday I was in my office, on Tuesday I was in the office, on Wednesday in the office, and on Thursday I have it here I went and took one of our levermen out there and discovered this accident.

Q. What sort of an automobile did you drive in 1934, Mr. Haas?

A. Well, let me see. I might have had a Packard or a Cadillac.

Q. Could you have been driving a Packard in the month of May, 1934?

A. Well, I am not so sure, I might have, but I ordinarily did not use my car over there; I did not use my car going over there. I do not believe I ever used it going over there.

Mr. Sharp: We have no further questions.

Mr. Wallace: Mr. Haas will come back this afternoon.

The Court: Get that data if you can.

Mr. Wallace: That will be our case, your Honor reserving the right to rebut any testimony that may be brought on by the Claimant. [149]

JOHN PEDERSEN,

called for the Claimant; sworn.

Mr. Sharp: Q. Your name is John Pedersen?

A. Yes.

Q. Where do you live?

A. 447 Main Street, Sausalito.

Q. What is your occupation?

A. I am a fireman.

Q. What was your occupation in May, 1934?

A. Fireman.

Q. Do you hold any marine license?

A. Marine license, first assistant.

Q. Do you hold a lifeboat certificate?

A. Yes.

Q. Where were you on or about the 17th of May, 1934?

A. I was employed on the dredge "Carson."

Q. In what capacity?

A. Fireman.

Q. At that time did you know a man by the name of Earl Brashear?

A. Yes.

Q. How long had you known him before that?

A. Not very long.

Q. About how long?

(Testimony of John Pedersen.)

A. I should say about six or seven months, I had seen him around town.

Q. How long had he been on board the "Carson" at that time?

A. About three or four days, I believe.

Q. Where was the "Carson" at that time?

A. Laying up in Hamilton Field, the channel we were digging there.

Q. And was she afloat in the channel?

A. Yes.

Q. How large a crew did the "Carson" have at that time?

A. About 12 or 14 men, I should judge.

Q. Were they living on the boat?

A. They were living on the boat.

Q. Do you know what, if anything, happened to Mr. Brashear on or about the 17th of May, 1934?

A. Why, yes, I happened to see him hop overboard.

Q. When did you first see Mr. Brashear before he hopped overboard?

A. I was in bed, I was called down by Jack Fancort, to [150] come down and give him a hand as he had trouble with Brashear down there, it was around 1 o'clock.

The Court: 1 o'clock in the morning?

A. Yes.

Mr. Sharp: Q. What did you do?

A. When I came down there Jack Fancort was sitting on top of Earl Brashear, and he was foam-

(Testimony of John Pedersen.)

ing at the mouth and out of his head, Earl Brashear was, and he asked me to stand by.

Q. What happened next?

A. Well, he was raving around there and was out of his head, praying and asking for something.

Q. What happened next?

A. You mean over what period of time?

Q. Just tell us what happened.

The Court: Tell in your own way what happened at that time.

A. Well, around three o'clock Jack Fancort went up to see the Captain in regard to seeing what we could do with him, and as I understand it Captain Forsyth told him to take him ashore after we got the water barge back from McNear's Point.

Mr. Sharp: Q. What did anybody do in your presence thereafter?

A. Well, Brashear was out of his head there off and on, and we were watching him, that was all we could do.

Q. You did not tie him up or anything?

A. No, there was no tying up; he was not violent, or anything, just running around, and we standing there watching him and talking to him.

Q. At that time was there a launch available so that you could have taken Brashear ashore?

A. Yes, I believe there was a launch available.

Q. Then what happened next?

A. Well, this is four years ago and it is hard to remember.

(Testimony of John Pedersen.)

The Court: You say he jumped overboard?

A. Yes.

Q. State during the time you were watching him what he did, as near as you can remember it.

A. Around about, I think it was around about half past four or along about that time, Jack Fanort [151] said, "I think I will go up and get a cup of coffee," and the boy was quieted down quite a bit there then, so I said, "All right, you go up, Jack," and he was sitting on a bench and I was sitting here, and the man was sitting on this side, and there was a door going out on the deck, and I was tired, sitting there watching him all night, and he seemed to be all right, and all of a sudden he gave one jump and went out through the door and dove over the side, and I tried to grab him, but I missed him.

Mr. Sharp: Q. Why didn't you go after him?

A. Well, I am a poor swimmer, and I did not want to take any chance of drowning myself.

Q. Was there any boat with which you could have gone after him?

A. No boat there.

Q. Would you have gone after him if you had had a boat?

A. Certainly.

Mr. Wallace: Objected to as speculative.

Mr. Sharp: Q. You have a life saving certificate and are familiar with what to do under the circumstances?

(Testimony of John Pedersen.)

A. I am.

Q. As a man with a life saving certificate, a the time, you could have saved the man if ther had been a boat there?

A. We could have picked him up——

Mr. Alexander: Just a moment. May we hav that go out for the purpose of the objection?

The Court: Yes.

Mr. Alexander: I object to that as being imma terial, irrelevant, and incompetent, and speculative

The Court: Objection sustained.

Mr. Sharp: Q. Is there any reason why you could not have picked up Mr. Brashear if you had a boat there?

Mr. Alexander: We object to that as being speculative, your Honor, immaterial, irrelevant, and incompetent. [152]

The Court: Develop the facts. You are limited to that, not what might have been accomplished.

Mr. Sharp: I wish to go on and develop that there was no boat there and the dredge was not rolling, and the boat could have been put out.

The Court: I will allow that testimony.

Mr. Sharp: Q. At the time Brashear jumped overboard what was the state of the weather?

A. It was fine, very calm.

Q. Was the dredge lurching or was it steady?

A. It was steady.

Q. Was there anything to prevent the use of the rowboat or the lifeboat to save him?

(Testimony of John Pedersen.)

Mr. Alexander: We object to that as being speculative. It is not developing the facts.

The Court: I will allow it.

Mr. Alexander: May the record show an exception.

A. No.

Mr. Sharp: Q. While you were on board the "Carson" did you ever see any life preservers or any life rings, or any life saving equipment of any character?

A. No, I did not, except the rowboat.

Q. Where was the rowboat?

A. Well, at that time it was tied up alongside.

Q. Where was the rowboat at the time Brashear went over?

A. Laying up, the side was smashed in the previous day.

Q. The rowboat was smashed at the time, you say?

A. Yes.

Q. How long had you been on the "Carson" prior to the date of this accident?

A. I believe I came on the "Carson" the 11th of May; I am not positively sure of that.

Q. While you were on the dredge did you ever have any lifeboat drill?

Mr. Wallace: Just a minute, we object to that as being im- [153] material, irrelevant, and incompetent.

The Court: She was laying on the bottom.

(Testimony of John Pedersen.)

Mr. Sharp: Here is a dredge with 12 or 15 men on, and I want to show there was not a single thing done for the protection of the men, either in equipment, or drill, or anything.

The Court: The Court would not be very much impressed unless there was a place where they could drill.

Mr. Sharp: Would your Honor let me argue that later?

The Court: All right, proceed.

A. No.

Mr. Sharp: Q. Had you ever been given any instructions as to what to do in the event anyone went overboard?

Mr. Alexander: To which we object on the ground it is immaterial, irrelevant, and incompetent.

Mr. Sharp: I will withdraw that question.

Q. How far away was the "Carson" from Hamilton Field at the time?

A. I should judge a mile and a half out, I am not sure on that.

Q. At the time that Brashear went overboard was the launch alongside of the boat or if not where?

A. At the time he went overboard?

Q. Yes.

A. The launch was on its way to McNear's Point with the water barge.

Q. While you were sitting alongside Mr. Brashear that night did you smell any liquor on his breath?

(Testimony of John Pedersen.)

A. No.

Q. Was there any liquor on board the dredge, to your knowledge?

A. I never saw any liquor on that boat.

Q. You are here under subpoena?

A. Yes.

Mr. Sharp: That is all on direct examination.

Cross-Examination.

Mr. Alexander: Q. Mr. Pedersen, you have just answered you are here under subpoena. Mr. Sharp is your attorney, isn't he? [154]

A. I am subpoenaed by Mr. Sharp, yes.

Q. He is your personal attorney, is he not, in your legal matters?

A. Yes.

Q. In other words, it did not need a subpoena to get you out here, you would have come out anyhow, if he had asked you?

A. I would not.

Q. You would not?

A. No.

Q. Then I am in error on that. I want to ask you a few questions, and I think you can give us a little help. What time did you go on watch that night?

A. That is four years ago, and I don't remember whether I got off at six o'clock that morning or twelve noon time, I don't remember.

Q. At any rate, what I mean is you did not go off watch at 12 o'clock that night, did you?

(Testimony of John Pedersen.)

A. No.

Q. You had gone up to—what do you call it, where you sleep?

A. We had rooms up there, a bunk, you might call it.

Q. The first you knew of the matter was when you were in your bunk?

A. Yes.

Q. At that time somebody came up for you?

A. Yes.

Q. I think you said it was Jack Fancort?

A. Mr. Fancort came up and called me up.

Q. Called you up?

A. Yes.

Q. And he asked you to come down and give him a hand?

A. Give him a hand.

Q. You got out of bed.

A. Yes.

Q. And at the immediate moment you did not know what help he wanted, is that right?

A. Yes.

Q. Then you went down where?

A. I went down in the boilerroom engine-room combined, that is on the same floor.

Q. The boiler- and engine-room combined?

A. Yes.

Q. That is on the main deck?

A. On the main deck. [155]

Q. And the boiler-room is an enclosed room, is it not?

(Testimony of John Pedersen.)

A. The boiler is on the after end, with a wide open space all around for the rest of the machinery, as far as I can remember.

Q. But I mean it is closed up from the weather?

A. Yes, they have a house around it.

Q. You went in there and found Mr. Fancort and he wanted you to give him a hand in watching the man?

A. Yes.

Q. And you agreed to do that?

A. Yes.

Q. In other words, although it was not your watch and not your duty, you stayed with him, did you not?

A. I stayed with him to help him out in case of trouble.

Q. I think you said that he was not very violent—I think that the language you used was he was not violent.

A. Well, what I mean by violent was, that he did not start to give any trouble for us, tackle any of us there, but he was out of his head.

Q. The two of you stayed there?

A. Yes.

Q. In other words, you did not go to bed and Mr. Fancort did not go to bed?

A. No.

Q. You two men stayed up with the man who was out of his head?

A. Yes.

(Testimony of John Pedersen.)

Q. And there was a bench in there and you sat on the bench?

A. Yes.

Q. And then was it about 4:30 when Mr. Fancort went up for the coffee?

A. Around that time, I should judge.

Q. Were you present when Mr. Fancort gave the man some aspirin?

A. I was present at the time.

Q. In other words, he gave him aspirin, or something of that kind?

A. Yes, trying to calm him down, trying to help him all he could.

Q. The two of you were trying to help him all you could?

A. Yes.

Q. About 4:30 he went up for the coffee?

A. Around 4:30.

Q. He said he was going to bring some coffee for Mr. Brashear, did [156] he not?

A. I don't remember him saying that; he said he was going to get some coffee for himself; that is all I can remember.

Q. In other words, whether he intended to bring some for you and Mr. Brashear you don't know?

A. No.

Q. Do you remember about what time it was when Mr. Fancort went to speak to Captain Forsyth?

A. Well, I should judge it was about around three o'clock, or a little after.

(Testimony of John Pedersen.)

Q. Before Mr. Fancort left the engine-room where was Brashear? Was he seated on the bench?

A. He was seated on the bench.

Q. He was quiet at the time?

A. Very quiet.

Q. And when Mr. Fancort left he was very quiet?

A. Very quiet.

Q. When Mr. Fancort left you did not expect any trouble?

A. I did not expect anything.

Q. When he got up it was a sudden movement on his part, was it?

A. Very fast movement; I never seen a faster movement that a man made.

Q. You are an active man?

A. In good condition, able to work, and able to handle myself.

Q. You made an effort to stop him, did you not?

A. I sure did.

Q. You were unable to do so?

A. I could not catch him.

Q. Did he open the door and go out on deck?

A. He swung that door open and jumped right over the side. It only took a second to go over there, a very short distance.

Q. In other words, he swung that door open and went to the side and jumped over?

A. Yes.

Q. And just before he did that you say he yelled out?

(Testimony of John Pedersen.)

A. He gave one yell and he was on his feet opened the door and went out.

Q. Before that time, though, he had been quiet?

A. Very quiet, yes.

Q. You made some mention of a boat that was damaged the day before.

A. I did not say the day before. I don't remember exactly what [157] day it was, but I know the boat was out of commission.

Q. You knew that Captain Forsyth was in the course of repairing it?

A. Yes.

Q. Now, when you got on the deck did you make any effort to give Brashear a chance to save himself by putting out anything?

A. I sure did.

Q. What did you put out?

A. There was a big plank laying alongside of the house there, and by that time the steward and Jack were down on deck with me, so me and the steward picked that plank up very fast and threw it out at him, and it came within two feet of him, but he never made any attempt to take it; in other words, he was trying to go away from the plank.

Q. In other words, you did that and he could have put his hand on it?

A. Yes, he could have put his hand on the plank.

Q. But instead of that he swam away from it?

A. Yes, he was trying to go up and down.

(Testimony of John Pedersen.)

Q. Do you know personally if anything else was thrown to him that he could have gotten hold of it helping himself?

A. I don't remember whether Fancort threw anything, but I know we had trouble getting that plank over.

Q. But you did get it to him?

A. We did get it close to him so that he could have gotten hold of it if he saw fit to put his hand on it.

Q. But he swam away from it?

A. He swam away from it.

Q. Let me ask you this, Mr. Pedersen, in his swimming did he apparently try to be on the surface of the water?

A. He tried to go down to the bottom: I saw him come up three times and go down.

Q. He would go down?

A. He would come up and then go down again.

Q. In other words, it was not the case of a drowning man coming to the surface, but he was intentionally diving down?

A. Intentionally, to my observation, he was trying to get down to the bottom, [158] and every time he came up he would go down.

Q. During the time when you were in the engine-room or fire-room—it is the same room, is it not?

A. Yes.

Q. During the time when he was talking did he say anything about a drink?

(Testimony of John Pedersen.)

A. He asked for a drink.

Q. And you say none was given him?

A. No.

Q. There was none on board?

A. There was none on board and none was given him.

Q. About what sized man was he?

A. Oh, I should judge he was about 5 feet 2 and weighed about 140 pounds, quite a nice looking chap.

Mr. Alexander: I think that is all.

Redirect Examination

Mr. Sharp: Q. Just one question: Mr. Alexander asked you whether I was your personal attorney. I would like to know in what case I am representing you.

A. Well, that is a mistake, you are not representing me in any case. You are not my attorney.

Q. I would be glad to, but I would like to know with respect to what.

The Court: The reason you are asked this question is whether or not you have any interest.

A. No.

Mr. Sharp: Q. I am not your personal attorney, or your attorney, at all, am I?

A. No.

Q. If so I would like to know about it.

A. You are not, I will tell you right now.

Mr. Alexander: Let me ask you one further

(Testimony of John Pedersen.)

uestion in regard to the Golden Gate Bridge mat-er, did Mr. Sharp act for you?

A. I was in that particular group.

Q. Mr. Sharp was acting for you and the bunch?

A. So I understand he was.

The Court: Have you been in this court before?

A. No, never. [159]

Mr. Sharp: What counsel is probably referring o is, your Honor, I represented a good many of hese Unions in times past, and there was a case bout eight years ago in which I acted.

Q. Were you a member of the Ferryboatmen's Jnion about eight years ago?

A. Yes.

Mr. Sharp: I represented the Ferryboatmen's Jnion about eight years ago. Is that what you nean, Mr. Alexander?

Mr. Alexander: I was trying to find out.

Mr. Sharp: I had no personal dealings with Mr. Pedersen at any time. That is all.

JOHN THOMAS FANCORT,

alled for the Claimant: Sworn.

Mr. Sharp: Q. Your name is John Thomas Fancort?

A. Yes.

Q. Where do you live?

A. 561 Spring street, Sausalito.

Q. What is your occupation?

(Testimony of John Thomas Fancort.)

A. Now I am working in the cement business.

Q. What was your occupation in May, 1934?

A. Fireman on the "Carson."

Q. Did you at that time or now hold any license?

A. Yes.

Q. In what capacity?

A. Second outside and first inside.

Q. Second outside and first inside?

A. Yes.

The Court: That means what?

A. First assistant inside and second outside.

Mr. Sharp: Off-shore on the ocean is outside and inside is the navigable waters of San Joaquin and Sacramento River.

Q. Were you on board the "Carson" on May 17, 1934?

A. Yes.

Q. In what capacity?

A. Fireman.

Q. How long had you been on board the "Carson"?

A. About two weeks.

Q. Did you at that time know Earl Brashear?

A. Yes.

Q. Had you known him for long before that?

A. I had known [160] of Earl about ten years, I personally knew him about three years.

Q. How do you happen to be testifying here now?

A. Through a subpoena.

(Testimony of John Thomas Fancort.)

Q. Am I your attorney?

A. No.

Q. You heard Mr. Pedersen's testimony with respect to Earl Brashear's death?

A. Yes.

Q. When did you first see Earl that night?

A. Well, it was about seven o'clock in the evening.

Q. Under what circumstances?

A. He sent a man down for me; he said that he was not feeling well and he wanted to see me.

Q. Then what happened?

A. Well, I left a man in my place and went up and gave him a couple of aspirins to quiet him down. He said he had a headache.

The Court: Q. Was he lying down at that time?

A. Yes.

Q. In a bunk?

A. In a bunk.

Mr. Sharp: Q. Then what happened next?

A. I went right down below on watch again and I never heard any more of him until after I closed down that night.

Q. What time was that, about?

A. 12 o'clock.

Q. What happened then?

A. After we closed down and put the lights and everything out, Carl Vogel and I went out on deck.

Q. Then what?

(Testimony of John Thomas Fancort.)

A. We heard some noise, and so we looked out and we seen somebody on the launch that was tied up alongside the dredge, so we went over and looked and it was Brashear on top of the launch.

Q. What was he doing there?

A. He was leaning over and talking to some imaginary person on board.

Q. Then what did you do next?

A. I went over and took hold of him and got him to come ashore and I brought him in the fire-room and talked to him and he seemed to be all right; so Carl said that he would be all right, and he went up and went to bed and I was [161] there alone with him.

Q. Then what happened?

A. Well, in maybe three-quarters of an hour or an hour afterwards he kind of went out of his head.

Q. What did he do?

A. Well, he got to talking funny about somebody putting fish hooks in his baby's eyes, and he crawled under the bench, and that is the time I went up and called Mr. Pedersen, because he was wedged in there, he could not get out, I knew he was stuck under there.

Q. Then what happened?

A. Then John came down and we got him sitting on a bench, one on each side of him, and talked to him, and he seemed to be all right after that.

Q. Then what happened next?

(Testimony of John Thomas Fancort.)

A. Well, about three o'clock or somewhere round in there he got kind of bad again, and so I went up and told the captain about it.

Q. What did the captain tell you?

A. The captain said we had better send him ashore, as soon as the launch comes back from taking water, I believe he said.

Q. Was the launch there at the time?

A. Yes.

Q. Did he say anything to you about tying him up?

A. No, I would not say he did.

Q. I am not asking you whether he would. As a matter of fact, was there any conversation or any discussion between you and the captain as to tying Brashear up?

A. No, not that I can remember.

Q. Then what did you do next?

A. Well, I went back down again and stayed with him and talked to him, until I heard the cook up, and I said, "Well, I will go up and get a cup of coffee, and see if that will quiet him down." I went up and told the cook what happened and I heard Pedersen holler that Earl had jumped overboard.

Q. Then what happened?

A. Pedersen and the cook got a plank and threw it out to him; and in the meantime the crew got up then, [162] the captain came out and asked me what was wrong and I told him about it, and he told me to blow two whistles, which I did.

(Testimony of John Thomas Fancort.)

Q. Was there any liquor around to your sight?

A. No.

Q. Were you close enough to smell Earl's breath?

A. Yes.

Q. Was there any liquor on it?

A. No.

Q. Did you see Earl every day he was on the boat?

A. Yes.

Q. Did he at any time have any liquor or smell of liquor on him?

A. No.

Q. How long had you known Earl?

A. Well, I think about ten years.

Q. Had he ever done anything similar to this? Had he in your experience ever been out of his head before?

A. Not that I know of.

Q. Did he do anything abnormal?

A. No.

Q. Or indicate any mental condition?

A. No.

Q. From your personal acquaintance with Earl what kind of a man would you say he was?

A. Well, he was a very attractable man, he was a good worker.

Q. Were you ever at his house?

A. Yes.

Q. Did you know his wife and children?

(Testimony of John Thomas Fancort.)

A. I know them by sight, I don't know them ersonally.

Q. Did you ever work anywhere else with Earl?

A. Yes, I worked with him on the California ity road.

Q. Do you know of your own knowledge whether e turned money over to his wife, or whether he pent it with the boys, or what-not?

A. Yes, he turned his money over to her.

Q. Now, on board the "Carson" were there any ife preservers, life rings, or lifesaving equipment?

A. There might have been but I never noticed ny.

Q. How long were you on board the boat?

A. About two weeks.

Q. Was there a lifeboat or a rowboat?

A. Yes.

Q. Where was it at the time that Brashear went verboard? [163]

A. The lifeboat was on the forward deck.

Q. What was its condition?

A. It had been broken a couple of watches be- ore.

Q. A couple of watches before would have been ow many days?

A. About two days, I believe.

Q. How large was the crew of the "Carson"?

A. About fourteen men.

Q. And they slept and ate on board the boat?

A. Yes.

(Testimony of John Thomas Fancort.)

Q. Where was the "Carson" at the time of Earl's death?

A. About a mile and a half or two miles from Hamilton Field.

Q. Was it floating in a navigable portion of San Francisco Bay?

A. Yes.

Q. Do you know what the nature of the operations was that the "Carson" was engaged in at the time?

A. She was dredging the channel from Hamilton Field to the navigable waters.

Q. Referring to these mud flats, were they covered with water, or not?

A. At high tide they were covered.

Q. At high tide it was all covered and could be used by boats of small draft?

A. Boats that drew very little water could use it.

Q. A boat that drew very little water could have navigated these mud flats?

A. Yes.

Mr. Alexander: At high tide was the question?

Mr. Sharp: Yes.

A. Yes.

Q. In what capacity were you employed on board the dredge "Carson"?

A. As fireman.

Q. Do you know what capacity Brashear was employed in?

(Testimony of John Thomas Fancort.)

A. Fireman.

Q. What did the fireman get as wages on board the "Carson" at that time?

A. I believe it was 75 cents an hour.

Q. How many hours a day did you work?

A. Six hours—I would not say for sure; that is so long ago I forget.

Q. Do you know the circumstances under which Earl was engaged as [164] fireman?

A. Yes.

Q. Relate those circumstances to the Court.

A. Well, there was an inspector that asked me if I knew anybody that wanted to go to work as fireman, and I told him yes, so I recommended Earl Brashear.

Q. Then when did you take Earl, if you did, to anybody, and if so to whom?

A. I had him meet the man down at the Golden Gate Ferry.

Q. What man?

A. The inspector.

Q. Who was present at the time?

A. I don't know the gentleman's name.

Q. You saw Mr. Haas testify?

A. Yes.

Q. Was he around?

A. No.

Q. Didn't you tell me that Mr. Haas was?

A. I said Mr. Haas drove us up there.

Q. That is what I am trying to get at. When did you meet Mr. Haas?

(Testimony of John Thomas Fancort.)

A. Well, that was on—what day it was I don' just remember, but it was the day that Brashea went up there; Mr. Brashear took his blankets an stuff and put them in Mr. Haas's car and Mr. Haa drove us up there.

Q. Where did you meet Mr. Haas?

A. Down at the Ferry.

Q. Did you go on the ferry to Sausalito?

A. Yes.

Q. You are sure that was Mr. Haas that testifie this morning?

A. Mr. Haas said he did not like taking him up

Q. I am asking do you remember it was Mr. Haas?

A. Yes.

Q. What was Earl's condition at the time you went in the car with Mr. Haas?

A. Normal, just like I was.

Q. How long were you in the car together with Mr. Haas?

A. We drove from Sausalito to Hamilton Field; we were sitting in the back of the machine.

Q. You did not sit with Mr. Haas?

A. No. [165]

Q. Was Mr. Brashear introduced to Mr. Haas?

A. No, I don't believe he was.

Q. Did you tell Mr. Haas Mr. Brashear's name?

A. Well, I couldn't say that I said that. I said we would pick him up. I met Mr. Haas at the ferry and I said, "We will pick Mr. Brashear up."

(Testimony of John Thomas Fancort.)

Q. You met Mr. Haas first and then the two of you went in the car?

A. Yes, sir.

Q. To Brashear's house?

A. Yes.

Q. Where was that?

A. We didn't go to the house, we met him on the highway.

Q. Mr. Haas knew you were going to pick up Mr. Brashear?

A. Yes.

Q. He picked him up and took him to Hamilton Field?

A. Yes.

Q. From Hamilton Field how did you get to the dredge?

A. Right on the car.

Q. From Hamilton Field?

A. We went through Hamilton Field to the start of the channel that they were dredging, took the launch, and went out to the dredge.

Q. Then you and Mr. Brashear and Mr. Haas went out together on that boat?

A. Yes.

Mr. Sharp: That is all.

The Court: We will take a recess now until two o'clock.

(A recess was here taken until two o'clock p.m.)

[166]

(Testimony of John Thomas Fancort.)

Afternoon Session

JOHN THOMAS FANCORT,

Direct Examination (Resumed).

Mr. Sharp: I will offer in evidence as Claimant's Exhibit No. 1 United States Topographical Map No. 5533, published at Washington, D.C. under date of January, 1934. This shows the channel being dug at that time and will assist the Court in locating where the dredge was and some of the other points referred to in the testimony.

(The Map was marked "Claimant's Exhibit 1.")

Now, I have in my hand five pictures that were introduced in evidence at the hearing before the Commissioner showing different views of the "Carson." Is that correct?

Mr. Wallace: I believe it shows views of the dredge as of some date in 1937.

Mr. Sharp: May these go in evidence as Claimant's Exhibits 2, 3, 4, 5, and 6?

The Court: Yes.

(The photographs were marked Claimant's Exhibit 2, 3, 4, 5, and 6, respectively.)

Mr. Sharp: Q. Mr. Fancort, in your testimony this morning you said that you went up and had a cup of coffee and came back and you found Mr. Brashear had jumped overboard; you came back and saw him in the water. At that time how far from the dredge was Mr. Brashear?

A. About 15 or 16 feet.

(Testimony of John Thomas Fancort.)

Q. How high above the water was the deck from which he jumped?

A. From the water to the deck of the dredge?

Q. Yes, from where he jumped.

A. I should judge about three feet or a little over.

Q. If there had been a lifeboat or rowboat there would it have [167] been possible to step right off from the dredge into the boat?

Mr. Alexander: To which we object as being purely speculative.

Mr. Sharp: Q. If the boat had been tied to the dredge and if the boat were in good order and condition and tied alongside the dredge would it have been possible to have stepped into the boat forthwith or would there have been some obstacle in the way.

A. Shall I answer that?

The Court: Yes.

A. Yes, you could get down by putting your foot on the cleat and then into the boat. You would have to go down about three feet to do that.

Mr. Sharp: Q. At the time you came down who was on the deck, besides yourself?

A. Mr. Pedersen and the cook.

Q. Four men?

A. Two men.

The Court: Pedersen and the cook?

Mr. Sharp: Pedersen and the cook.

A. Yes. The rest of them were just up above.

(Testimony of John Thomas Fancort.)

Q. Did the captain come down at all?

A. Yes, the captain came out.

Q. When the captain came down where was Brashear?

A. Brashear was in the water.

Q. How far away from the boat?

A. About 20 feet.

Q. Did anybody throw a line to him?

A. I believe there was a line thrown, I am not positive now. I know they threw the plank.

Mr. Wallace: There was some question to be asked of Mr. Haas. Would it be in order to have them answered at this time?

Mr. Sharp: Yes, anything is agreeable.

Mr. Wallace: You asked him to produce his records and he brought them.

Mr. Sharp: You wish to postpone the cross-examination of Mr. Fancort?

Mr. Wallace: Yes. [168]

Mr. Sharp: That is perfectly agreeable.

EDWARD F. HAAS,

recalled.

Mr. Wallace: Q. Mr. Haas, as requested this morning by counsel for the Claimant, did you make a search for the records showing the profit from the operation of the dredge "Carson"?

A. Yes, I did.

(Testimony of Edward F. Haas.)

Mr. Sharp: If Your Honor please, that was not my question. I was not interested in the profit. I was interested in what the contract price was that they were to receive.

Mr. Wallace: Q. You made a search for the information requested by Mr. Sharp?

A. Yes.

Q. You have that information with you?

A. Yes, I have.

Cross-Examination.

Mr. Sharp: Q. What was the amount of money received by you, Mr. Haas, under the contract for the dredging work, in the month of May, to Hamilton Field?

Mr. Wallace: We wish the record to show an objection on the ground it is immaterial, irrelevant, and incompetent, has no bearing on any issue in this case. In other words, the profit made from the operations of the dredge would not be within the scope of the proceeding.

The Court: I will overrule the objection. It may be received subject to a motion to strike.

A. What is the question?

Mr. Sharp: I am asking you to tell the Court how much money was received by you under the contract covering the dredging operations at Hamilton Field in May, 1934.

A. The amount received was $1813.55. The cost of the operations was $1667.91. The profit was $145.54.

(Testimony of Edward F. Haas.)

Mr. Sharp: I am going to ask that everything but the amount [169] received be stricken out.

The Court: I will let the record stand. Proceed.

Mr. Sharp: That is all.

Redirect Examination.

Mr. Wallace: Q. Mr. Haas, the sum of $1813 that you said your record shows you received from this particular voyage or operation of the "Carson," how was that computed?

A. It was computed on the number of hours at $6.75 per hour.

Q. Did any of that sum received from the dredging operations come from any cargo carried on board the dredge "Carson" and for which you received freight?

A. No.

Q. As I understand it. Mr. Haas, that was the amount computed on an hourly basis for the service of the dredge in dredging?

A. Yes. We rented that dredge very often in the past on services per hour, which included the use of the dredge and everything that went with it.

Q. But no cargo of any kind was ever carried on there for a third party?

A. No.

Recross Examination.

Mr. Sharp: Just let me get myself straight. All of this $1813 was received by you for services performed by the dredge in the course of the voyage

(Testimony of Edward F. Haas.)

lleged in your petition from May 9 to May 28, 934?

A. That is the money we got.

Q. During that period, May 9 to May 28, 1934?

A. Yes, and $1600 for expenses.

JOHN THOMAS FANCORT,

Cross-Examination.

Mr. Alexander: I want to ask a few additional questions, Mr. Fancort, in regard to the boat which was broken. You said you saw it a couple of watches before Brashear died?

A. Yes. [170]

Q. Might it have been the day before that that was broken?

A. Well, I believe it was a watch before I went on.

Q. There is some uncertainty in your mind?

A. I cannot say for sure.

Q. On the day just before this accident happened the boat was being repaired, was it not?

A. Yes.

Q. Now, you were on watch the night of the 16th of May, were you not, to midnight?

A. Yes.

Q. To midnight, or the morning of the 17th?

A. Yes.

Q. You went off watch about what time?

A. 12 o'clock.

Q. Midnight?

(Testimony of John Thomas Fancort.)

A. Yes.

Q. And your attention was then called to Mr. Brashear being on the launch?

A. Yes.

Q. You went on the launch with Carl, I think you said, Carl Vogel?

A. Carl didn't go on the launch, he stayed on the dredge.

Q. You went on?

A. Yes.

Q. You spoke to Mr. Brashear?

A. Yes.

Q. And the result was he came back on the dredge with you?

A. Yes.

Q. Did you call him by name?

A. Yes.

Q. Did he make any rational response?

A. No.

Q. But he did talk with you?

A. Yes.

Q. Then you suggested going into the boiler-room?

A. We went into the fire-room.

Q. The fire-room?

A. Yes.

Q. That is the room that I think Mr. Pedersen spoke of.

A. Yes.

Q. A little while ago I think you mentioned the name Pedersen.

(Testimony of John Thomas Fancort.)

A. Yes.

Q. That was the gentleman who was on the stand just before you?

A. Yes.

Q. You are referring to the witness who was on the stand this morning?

A. Yes. [171]

Q. When you went into the fire-room—is that what you call it?

A. Yes.

Q. About how large was that room?

A. Well, from bulkhead to bulkhead it would be about 5 or 6 feet.

Q. And the length?

A. The length is about 14 or 15 feet.

Q. There was a bench, a place in there to sit down?

A. A wooden bench.

Q. When you went in there did Carl Vogel go with you?

A. Yes.

Q. Did Mr. Brashear sit on the bench?

A. I believe he did at that time.

Q. And Mr. Vogel stayed there about an hour or so, did you state?

A. No. he didn't stay that long. I don't know just how long he did stay.

Q. Anyhow, Mr. Brashear was quiet, was he?

A. Yes, he was not bad then.

Q. Then Mr. Vogel went to bed?

A. Went to bed.

(Testimony of John Thomas Fancort.)

Q. To his bunk.

A. Yes.

Q. Later in the night you went and got Mr Pedersen to give you a lift, to help you?

A. Yes.

Q. In the meantime you had been there alone had you not?

A. Yes.

Q. And it was not your watch, was it?

A. No, I was all through with my watch.

Q. In other words, if the man had not been in that condition you would have gone to bed?

A. Yes.

Q. But because he was in that condition you stayed up with him?

A. Yes.

Q. To do what you could do?

A. Yes.

Q. I think you said at one time he got under a pipe, is that right?

A. Under the bench.

Q. Caught himself there and could not get out?

A. Yes.

Q. At that time you went up and asked Mr. Pedersen to come down [172] and help you?

A. That is the time I went up and got Pedersen.

Q. And Mr. Pedersen came down gladly?

A. Yes.

Q. And stayed with you, did he?

A. Yes.

Q. And then the two of you stayed with Mr.

(Testimony of John Thomas Fancort.)

Brashear until about half past four, did you say?

A. Yes, about that, around half past four or five o'clock.

Q. You say about four thirty or five o'clock you heard the steward, the cook upstairs?

A. Yes.

Q. At that time Mr. Brashear was quiet, was he?

A. Yes.

Q. And was sitting on the bench?

A. Yes.

Q. He had not threatened to jump overboard at any time, did he?

A. No.

Q. So then you said you would get some coffee for him?

A. That is right.

Q. The night before, after dinner, about 7 o'clock I think you went to see him, did you not?

A. Yes.

Q. He told you he had a headache then?

A. Yes.

Q. You got aspirin for him?

A. Yes.

Q. Was there anything at that time to make you think it was anything more than a headache?

A. No.

Q. You gave him the aspirin?

A. Yes.

Q. Then about half past four or five you went and got some coffee for him?

(Testimony of John Thomas Fancort.)

A. No, when I went up for the coffee, that is the time he jumped overboard.

Q. Before that did you speak to the captain?

A. Yes, I did.

Q. About what time?

A. I should judge about three o'clock.

Q. When you spoke to the captain had Brashear quieted down at that time?

A. Yes, he was quiet then.

Q. And did you tell the Captain that he had quieted down?

A. Yes.

Q. And the captain told you that after the launch came back from the water next morning he would be taken and landed somewhere? [173]

A. He would take him over to the hospital, over to the Field.

Q. At that time you had in mind Hamilton Field?

A. Yes.

Q. And the dredge was about how far from the edge of Hamilton Field?

A. I should judge about a mile and a half.

Q. And when you got to the point there, the edge of the Field, there were no buildings there?

A. No.

Q. You had to go about a mile or more to where they were building Hamilton Field?

A. I should judge a mile or a mile and a half.

Q. They were building the field at that time, were they not?

(Testimony of John Thomas Fancort.)

A. Yes.

Q. The hospital was not there, was it?

A. I could not say.

Q. It was not a completed field, as we see it now, as we go over there?

A. There were completed houses, but what they were, I don't know.

Q. When you spoke to the captain the captain told you he would arrange to have Brashear taken ashore when the boat came back from the water?

A. Yes.

Q. The fire-room that you spoke of, was that enclosed?

A. Yes.

Q. Were the doors closed leading to the deck?

A. Yes.

Q. About what time was it when you went up to get Pedersen?

A. That was around 1 or a little after, I guess.

Q. And from then until you went to get coffee for Mr. Brashear both you and Mr. Pedersen stayed in that fire-room looking after Mr. Brashear?

A. Yes.

Q. There was no other purpose in your staying up?

A. No.

Q. The two of you stayed on the job looking out for him?

A. Yes.

Q. During the night did you give him any more aspirin?

(Testimony of John Thomas Fancort.)

A. I believe I went up and got some more for him.

Q. After you had gone to get the coffee for Mr. Brashear what attracted your attention?

A. Pedersen hollered that Brashear jumped overboard. [174]

Q. And you then rushed down?

A. No, the dredge has got a platform, and I stood up on top of the platform.

Q. Did you see him in the water?

A. Yes.

Q. Now, you spoke of a plank or planks. Were there two planks that were put out for the man to catch hold of, or one?

A. There was a plank that Pedersen and the cook threw over.

Q. That was a big plank?

A. Yes.

Q. Did Brashear make any attempt to put his hand on it?

A. I don't think he did, I didn't see that.

Q. Did he seem to be trying to get away from the dredge?

A. He was diving up and down.

Q. Did you throw out a heaving line?

A. No, I did not throw it out.

Q. Who did, do you know?

A. I don't remember who did it. Somebody threw a line out.

(Testimony of John Thomas Fancort.)

Q. That is a line that a man in the water could catch hold of?

A. Yes.

Q. Did he make any effort to get near it?

A. I don't think they threw it close enough to him.

Q. Was the plank close to him?

A. Yes, about two feet away.

Q. I called it a heaving line.

A. A heaving line is right.

Q. Somebody threw it in?

A. I believe so.

Q. Will you describe the heaving line?

A. Well, the heaving line is about an inch in circumference and about 100 feet long, with a knot on the end of it.

Q. Did he keep diving down when he came to the surface?

A. Yes.

Q. He made no effort to save himself in any way?

A. No, not that I could see.

Q. Was he going away from the dredge or coming toward it?

A. Going away from the dredge.

Q. I think you mentioned two whistles being blown.

A. Yes. [175]

Q. You did that under the direction of the Captain?

(Testimony of John Thomas Fancort.)

A. The Captain.

Q. And that brought the launch back?

A. Yes.

Q. Did the launch make an effort to find him at that time?

A. With a grappling hook.

Q. Do you swim?

A. No.

Q. If you could swim would you have gone after a man in his condition?

A. I, myself, if I could swim, I do not believe I would go after him.

Q. You would be afraid he would pull you both down?

A. Yes.

Q. At the time Mr. Brashear got his job on the the dredge did he get the job from Captain Forsyth?

A. Captain Forsyth, when he came aboard, told him what he had to do.

Q. But you had suggested him to Captain Forsyth?

A. Yes.

Q. Now, when he came on board at that time, that was three or four days before he jumped overboard?

A. Yes.

Q. What was his condition with regard to drinking?

A. There was not any drinking aboard.

(Testimony of John Thomas Fancort.)

Q. Did he show the effects of drinking at that time?

A. No, he did not seem to.

Q. Was anything said to you by Captain Forsyth as to whether he had been drinking or not?

A. No.

Q. He was a heavy drinker, though, as a matter of fact, wasn't he?

A. He was not a heavy drinker, he was a man that took a drink.

Q. "Well, Earl did drink quite a bit."

A. He did drink.

Q. I was reading from your testimony at the inquest. Had you seen him before the time he was hired, within a week or two?

A. Two weeks.

Q. Two weeks. So you don't know what he had been doing during those two weeks?

A. No.

Q. You heard him described as about 5 feet 2 and about 140 pounds by weight, by Mr. Pedersen, is that about right? [176]

A. That is about right—well he was a little over 5 feet 2, I believe. I think it was a little taller than that.

Q. Possibly 5 feet 3?

A. Somewhere around there.

Q. At the time, I do not mean the precise moment, but on the day before it happened the dredging was going on?

(Testimony of John Thomas Fancort.)

A. Yes.

Q. And you were making the channel into Hamilton Field?

A. Yes.

Q. That is to say, a new channel where there had been a channel before?

A. Yes.

Q. That channel is there now, the one that was dredged out?

A. I don't know.

Q. It is unless they changed it?

A. Yes, it is unless they changed it.

Mr. Alexander: I think that is all.

Redirect Examination.

Mr. Sharp: Q. Just one or two questions, Mr. Fancort. You said in response to a question from Mr. Alexander that if you were able to swim you would not have jumped in after Mr. Brashear. Let me ask you, if there had been a boat there to take you would you have gone in the boat to rescue Mr. Brashear?

A. Certainly.

Mr. Alexander: To which we object as speculative, immaterial, irrelevant and incompetent, and ask that the answer be stricken out.

The Court: I will let the answer stand.

Mr. Alexander: Exception.

Mr. Sharp: Q. At the time you were discussing Brashear's condition with the captain did you dis-

(Testimony of John Thomas Fancort.)

uss with him the danger of Brashear jumping verboard and the possible advantage of tying him ıp?

A. No, I told the captain that the man seemed o be out of his head, there was something wrong vith him, and I believe the captain said something bout "We will have to tie [177] that man like we lid the other time until we get rid of him," or omething of that sort.

Q. What did he mean by "the other time"?

A. I don't know, the Captain said there was nother man went that way and they had to tie ıim up.

Q. Did the captain tell you to tie him up, or dvise you to, or what?

A. Well, he said we would have to tie him up if ıe got any worse, to let him know.

Q. Captain Forsyth, the gentleman with whom ou discussed the matter at this time, is present in he court-room now?

A. Yes.

Q. Why didn't you tie him up?

A. Because it was not necessary.

HAZEL BRASHEAR

Called for the Claimant; Sworn.

Mr. Sharp: Q. Your name is Hazel Brashear?

A. That is right.

Q. You are the administratrix of the estate of your husband, Earl Brashear?

A. Yes, I am.

Mr. Sharp: I have a certified copy of the letters of administration here if counsel makes any point of it, but I suppose it may be stipulated that she is the duly appointed and qualified and presently acting executrix of the Estate of Earl Brashear?

Mr. Alexander: Appointed the 15th day of April, 1936.

Mr. Sharp: The order is April 10, but the actual letters of administration were issued April 15, 1936.

Q. The deceased was your husband?

A. Yes.

Q. You were married about when?

A. Ten or eleven years ago.

Q. You lived with Earl Brashear as husband and wife up until the time of his death?

A. Yes.

Q. Were there any issues as the result of the marriage of Earl Brashear and yourself?

A. Yes.

Q. Please give me the names and ages of the children. [178]

A. Richard is 9, and Gloria is going on 7.

Q. Richard is now 9 and in May, 1934 was 5?

A. Yes.

(Testimony of Hazel Brashear.)

Q. And Richard is in the court-room?

A. Yes.

Q. And Gloria is how old now?

A. She will be 7 the 19th of this month.

Q. She was 3 in May of 1934?

A. Yes.

Q. And Gloria is in the court-room now?

A. Yes.

Q. How old are you now, Mrs. Brashear?

A. 28.

Q. In May, 1934 you were 24?

A. That is right.

Q. How old was Earl Brashear at the time of his death?

A. 28.

Q. How long had you known Earl Brashear before you were married?

A. I was 15, when I was going to school.

Q. What was the state of Earl's health during all the time you knew him up to the time of his death?

A. He was always in perfect health.

Q. Was he ever sick?

A. At one time.

Q. When?

A. In 1931.

Q. Did he get over that?

A. Yes, he did.

Q. Was he able to work after that the same as he was before?

(Testimony of Hazel Brashear.)

A. Yes.

The Court: Is that your mother here?

A. That is my husband's mother.

Mr. Sharp: Q. Have you any pictures of your husband?

A. Yes, I have.

Q. Are those here?

A. Yes.

Q. Will you tell the Court when those pictures were taken and whether they approximately represent his appearance in 1934?

A. Yes. This one was taken shortly after we were married.

Q. Which one?

A. This one.

Mr. Sharp: We will ask that that be marked Claimant's Exhibit next in order.

(The photograph was marked "Claimant's Exhibit 7.") [179]

A. (Continuing) This one was taken in 1926, I think, I am not sure.

Q. Did he look any different at the time of his death?

A. No.

Mr. Sharp: I ask that that be marked Claimant's Exhibit next in order.

(The photograph was marked "Claimant's Exhibit 8.")

Q. What was your husband's occupation or profession during his lifetime?

(Testimony of Hazel Brashear.)

A. He was a fireman on boats and trains.

Q. Do you know how long he had been employed as a fireman on trains and boats?

A. He had been about five years on the railroad.

Q. How long on boats?

A. I could not say how long on boats.

Q. Did he work on ferryboats as fireman, or on ocean boats as well?

A. He worked on ferryboats and he also went to sea.

Q. Do you know what your husband's earnings were during your married life?

A. Yes, I do.

Q. How do you know that?

A. Well, I know he turned the money over to me.

Q. How much did he turn over to you during your married life per month, as nearly as you can state?

A. I could not say that, because he worked on irregular jobs. He had as high as $200 a month.

Q. What would you say, on the average, would be the least that he would turn over to you per month when he did work?

A. The least he ever made was $100 a month. We would not be able to live if he had not.

Q. What is the most he made per month?

A. $200.

Q. So would you say his earnings during your married life were from the bottom $100 and the top

(Testimony of Hazel Brashear.)

$200 a month, and he turned over all of those earnings to you?

A. Yes.

Q. What did you do with the earnings he turned over to you?

A. I ran the house and raised the children.

Q. Did your husband have any income outside of his earnings?

A. No, he did not. [180]

Q. What was his attitude toward you and toward the children?

A. It was very good.

Mr. Wallace: We object to that.

The Court: The objection will be sustained.

Mr. Sharp: Q. Was your husband of an industrious character, or lazy, or what?

A. No, he was always doing something; he never was idle, he was studying to be an electrical engineer.

Q. Did he take any correspondence courses?

A. Yes, he did. He took a course with the International Correspondence School. He was an artist. He was studying to be an engineer.

Q. You mean a marine engineer?

A. Yes.

Q. You say your husband drew things. Have you any samples of things drawn by him?

Mr. Alexander: I object to that, Your Honor.

The Court: That is going afield. The Court will sustain an objection to that.

(Testimony of Hazel Brashear.)

Mr. Sharp: Q. Was your husband a drinking man, Mrs. Brashear?

A. He never drank on the job.

Q. Did he drink at home?

A. No, he did not; he just drank moderately.

Mr. Sharp: That is all on direct examination at this time.

Cross Examination.

Mr. Alexander: Q. In regard to drinking, Mrs. Brashear, is it not a fact that he was quite a heavy drinker?

A. No, not at all.

Q. Take during the year before his death, what was his condition?

A. He was all right, he was always in perfect health.

Q. He was not working, was he?

A. He was always working.

Q. Well, now, will you tell us what job he had before he went on the dredge?

A. He worked as a mechanic part time, as a plumber's helper, and he also worked for my brother.

Q. Isn't it a fact that Mr. Brashear's earnings were so small that [181] your brother had to support him?

A. He never made less than $100 a month.

Q. Isn't it a fact you were living with your brother at the time of your husband's death?

(Testimony of Hazel Brashear.)

A. No, I was not living with my brother. I was only over there for a few days.

Q. What was the reason for that?

A. He had hired me there.

Q. Isn't it a fact that you had been living with your brother for some months because your husband was not making enough to pay the rent?

A. No, that is not so. I was only there a few days.

Q. You testified at the Coroner's Inquest, did you not?

A. I don't remember what I said at the inquest, I was so nervous I could have said almost anything.

Q. You testified, did you not?

A. If I said some months it is not so.

Q. I have not asked you that question. You testified at the Coroner's inquest, did you not?

A. I testified at the inquest.

Q. You were present at the inquest before the Coroner?

A. Yes.

Q. You were called as a witness and gave evidence as a witness, did you not?

A. Yes, I did.

Q. I will ask you if at that time you did not give the following testimony? If you want me to show it to you, Counsel, here it is.

Mr. Sharp: Let me see it.

Mr. Alexander: It is on page 13, starting at the part I have marked here, and over on this page. You

(Testimony of Hazel Brashear.)

can read anything else you want to, but it is this part I am going to ask you about.

The Court: Have you read those questions and answers?

A. Yes.

Q. Is it your recollection that you gave those answers?

A. I don't remember saying it.

Mr. Alexander: Q. It reads: "Coroner: When he drank did you ever know him to drink to the point of being right down and [182] out and incapable of handling himself?

A. No. The last two months I have been living with my brother.

"Q. Were you and your husband separated?

A. No.

"Q. Why had you been living apart during that time?

"A. Well, we couldn't pay the rent.

"Q. It wasn't a matter of misunderstanding between you, just an economical move?

A. Yes."

Q. Did you give that testimony?

A. I don't remember. I know I worked for my brother, making a little extra money. I might have said that, but I don't remember.

Q. You remember your husband took a carpet from the house a few weeks before his death?

A. No.

(Testimony of Hazel Brashear.)

Q. Do you remember of his selling it to buy liquor?

A. No, I do not.

Q. Your brother that you were living with, what was his name?

A. Mr. Todd.

Q. That was the brother referred to in your testimony at the Inquest?

A. Yes.

Q. Now, again I want to call your attention to some testimony. Will you read to yourself on page 11, line 20 to line 31, the part that I have marked?

A. Yes.

Q. This is from the testimony at the Inquest, where you testified:—this is by the Coroner:

"Q. Where had he worked last, before working on this dredger?

"A. On the 'Maui', the boat that runs to Honolulu.

"Q. What was he? A fireman?

A. Fireman.

"Q. When was he last on the 'Maui'?

A. I am not sure, but I think it was four or five weeks before he had this other job.

"Q. He had worked quite steadily lately?

A. No, just what he could get from the C. W. A.

"Q. He was evidently employed steadily on the boat that ran to [183] Honolulu?

A. No, he hadn't worked long on that."

(Testimony of Hazel Brashear.)

You gave that testimony?

A. Well, I did not mention the other jobs. When he was supposed to be working for the C. W. A. he was always working extra.

Q. Did you give the testimony that I read?

A. Yes.

Q. Will you tell us why he left the Northwestern Pacific Railroad?

A. I didn't know that he had left it.

Q. He had worked there at one time, hadn't he?

A. Why, yes.

Q. Why did he leave?

A. I didn't know that he left; he worked extra work. He did not work all the time on the railroad.

Q. He had worked for the Northwestern Pacific Company, hadn't he?

A. Yes.

Q. He left there in about 1932?

A. I am not sure.

Q. What was the reason, why?

A. I don't know that he left the railroad.

Q. You knew he had been working for them?

A. Yes.

Q. You knew that he quit working for them?

A. Well, I just knew he didn't work all the time.

Q. Didn't you know that he was discharged because of drinking?

A. No, I never heard of that.

Q. You never did?

(Testimony of Hazel Brashear.)

A. No, I did not.

Q. Now, in the year 1930 he was working for the Northwestern Pacific, wasn't he?

A. In 1930?

Q. Yes.

A. Yes, I think he was.

Q. Do you know what he was making?

A. The only thing I know was what he turned over to me.

Q. About how much did he turn over to you in 1930?

A. I can't remember that.

Q. What is that?

A. I can't remember that. I did not keep any record of it.

Q. I will hand you these figures and see if they help you. You may look at it, Counsel. [184]

Mr. Sharp: This shows he was called at various times and not continuously so that it is not a fair statement of what he made on the basis of the record. It does not purport to be a record of the witness' earnings. It appears that he worked for the locomotive fire department and the mechanical department, that he did work irregularly on this particular job, and some of the figures run into large amounts. Here is one, for example of $111 for a two weeks' period.

Mr. Alexander: It shows for 1930 his total earnings were less than $100 a month, isn't that so?

(Testimony of Hazel Brashear.)

Mr. Sharp: I don't know, to be honest with you. I do not understand these records any more than the witness does.

The Court: Is that all from the witness on the stand?

Mr. Alexander: Just one or two questions and I will be through.

Q. Now, you stated he gave all of his earnings to you?

A. Yes, he did, except a small amount for himself.

Q. During the time, as you testified at the Inquest, he was unable to pay the rent and you went to live with your brother, he didn't give you much, did he?

A. Yes, he gave me what the C. W. A. gave him, and then he worked at odd jobs, he did some plumbing, he was a very good mechanic.

Mr. Alexander: That is all.

Redirect Examination

Mr. Sharp: Q. How long were you, as a matter of fact, at your brother's house at the time referred to by Mr. Alexander?

A. I was not there more than a week or ten days.

Q. At all other times where were you living?

A. I was home.

Q. Who was living at home with you?

A. My two children and my mother-in-law.

(Testimony of Hazel Brashear.)

Q. Your mother-in-law, your husband and yourself were living together all during your life except how much time?

A. Ten days. [185]

Mr. Sharp: That is all.

MORSE HIATT,

Called for the Claimant; Sworn.

Mr. Sharp: Q. Where do you live?

A. In Sausalito.

Q. Did you know Earl Bashear in his lifetime?

A. Yes.

Q. How long did you know him?

A. About ten years.

Q. In what way did you know him?

A. Through friendship, that is all.

Q. Did you work together on the same job?

A. We worked together at sea on the "Harvard" from here to Los Angeles.

Q. What year was that?

A. 1920.

Q. In what capacity did you act?

A. As oiler.

Q. In what capacity did Earl act?

A. As oiler.

Q. During the time you knew Earl what was the state of his health?

A. Fine.

(Testimony of Morse Hiatt.)

Q. During that time did he show any mental abnormality of any character, whatever?

A. No.

Q. Did he ever have any hallucinations, to your knowledge?

A. No.

Q. Did he show any signs of insanity or mental difficulty?

A. No.

Q. Did you work with him at the shop at Sausalito at all?

A. Yes.

Q. How long?

A. I was there about a year, and he was there about two years.

Q. What kind of a workman was he?

A. Well, he was working all the time, he was a good workman.

Q. Was he was industrious man?

A. He was industrious all the time.

Q. Do you know anything about Earl's drinking habits?

A. Well, he took a drink once in a while, but he was not drinking every day; he did not make a habit of it.

Q. Did you ever see him drunk?

A. No.

Q. Was Earl sick during the time you knew him?

A. He was sick once, [186] I think that is all.

(Testimony of Morse Hiatt.)

Q. Do you know the nature of the sickness?

A. No, I do not.

Q. Do you know what his habits were? Did he study?

A. He was studying all the time.

Q. What was he studying for, to your knowledge?

A. He was studying to be an electrical engineer with the International Correspondence School.

Q. Did he have any license, to your knowledge?

A. No, no license at all.

Mr. Sharp: That is all.

Cross Examination

Mr. Alexander: Q. You spoke of working at the shop at Sausalito. Do you mean the Northwestern Pacific?

A. Yes.

Q. Don't you know, as a matter of fact, he was discharged there because of drinking?

A. No, I do not.

Q. Do you know why he was discharged?

A. I do not.

Q. You never saw the records?

A. No.

Mr. Alexander: I think that is all.

WILLIAM A. BISHOP,

Called for the Claimant; Sworn.

Mr. Sharp: Q. What is your name?

A. William A. Bishop.

Q. Where do you live?

A. 105 Glen Drive, Sausalito.

Q. Did you know the deceased Earl Brashear, in his lifetime?

A. Yes.

Q. How long had you known him?

A. I would say from the time he was first employed in the Northwestern Pacific.

Q. When was that, about?

A. Well, I would say it was about 1928.

Q. About 1928?

A. Yes.

Q. Do you know what work he was doing?

A. Yes.

Q. What work?

A. He worked in the roundhouse, and later as a locomotive fireman. [187]

Q. Were you present at any time when he was a fireman on a train?

A. Only once during the time that he was making trips as a fireman, I happened to be on that particular train.

Q. How many years did you say you knew Earl?

The Court: He said since 1928.

Mr. Sharp: Q. Did you know him socially, as well?

A. To a certain extent, yes.

(Testimony of William A. Bishop.)

Q. Did your wife know his wife?

A. Yes.

Q. Do you know what the state of Earl's health was during the time you knew him?

A. He always appeared healthy to me.

Q. Did he ever show any signs of abnormality or mental trouble?

A. No.

Q. Do you know of your own knowledge under what circumstances Earl left the employ of the Northwestern Pacific?

A. No.

Q. What is your present official capacity relative to the Fireman's organization, if any?

A. I am the Local Chairman for the Fireman's organization.

Q. What is your official title?

A. Local Chairman.

Q. Of what?

A. Of the Brotherhood of Locomotive Firemen and Enginemen.

Q. As such chairman what is your duty with respect to members of the organization and employees?

A. Well, to handle any grievances over schedule violations or any time that anyone is short in pay, or anything like that.

Q. Would it be within the scope of your duties as Chairman to pass upon the question pertaining to seniority?

(Testimony of William A. Bishop.)

A. Yes.

Q. Would you be able to identify the seniority list for firemen on the Northwestern Pacific for 1931 if it was shown you?

A. Yes.

Q. Would you know the seniority list that was prevailing on the Northwestern Pacific for firemen on July 1, 1931, if it was shown you?

A. I would.

Q. I hand you herewith what purports to be a seniority list and ask [188] you whether or not that is the list.

Mr. Alexander: Just a moment. We object to that as calling for hearsay, immaterial, irrelevant and incompetent.

The Court: If he knows of his own knowledge I will allow it.

A. Yes. This is a seniority list of firemen on the Northwestern Pacific. I have copies of it in my file.

Mr. Sharp: Q. What number on that list is Earl Brashear?

A. On this list he is 74.

Mr. Alexander: What year was that?

Mr. Sharp: July 1, 1931.

Q. Now, in 1931 would a fireman who was No. 74 on the list have an opportunity for continuous employment or irregular employment, or what?

Mr. Alexander: Just a moment, I object to that, because it is not qualified. He is subject to dismissal for intoxication, for cause.

(Testimony of William A. Bishop.)

Mr. Sharp: I am willing to limit my question.

Q. Assuming he is in good standing on the list.

A. A man that had that seniority in 1931, I would say that he would not be able to work at any time of the year.

Q. Were conditions any better in 1932?

A. No.

Q. Better or worse?

A. Well, I could not say that they were any worse, but they were not any better.

Q. How about 1933, were conditions better or worse?

A. I would say they were some better, yes.

Q. In 1933 would a man No. 74 on this list have an opportunity for regular employment?

A. Well, if he had it would only be for a very few months during the summer.

Q. Assuming a man to be in good standing on the seniority list, just how does it operate with respect to his employment?

A. In the first place, if a man was on furlough, when he is put back to work, it is [189] up to the organization to check up on what we call mileage; they work on a mileage basis; if conditions pick up and the mileage increases, the local chairman checks the mileage and assigns men usually from the extra list to take care of the work.

Q. A man who is on the extra list with a low number, what is his opportunity for work?

A. If he is on the extra list he takes his turn, what we call first in and first out.

(Testimony of William A. Bishop.)

Q. Would a man with a seniority number of 74 have much opportunity for regular work?

A. No, he would not except in the summer months.

Mr. Sharp: That is all.

Cross Examination

Mr. Alexander: Q. Mr. Hiatt, do you know personally the reason why he was dropped from the Northwestern Pacific?

A. No, I do not, I have heard——

Mr. Sharp: Just a minute. We object to any hearsay. The record discloses he does not know.

Mr. Alexander: Have you heard of his having any fainting spells or falling?

A. No.

Mr. Alexander: I think that is all.

ADRIAN J. McPHERSON,

Called for the Claimant; Sworn.

Mr. Sharp: Q. Did you know Earl Bashear in his life time, Mr. McPherson?

A. Yes, I did.

Q. How long had you known him?

A. About ten years.

Q. How well did you know him?

A. Well, I knew him very well in a business way. I happened to be in business here and he was in and out of my place every day or two.

(Testimony of Adrian J. McPherson.)

Q. When you first knew him did you know wha his occupation was?

A. Well, he was a call boy for the railroad [190

Q. Were you in a position to observe his physi cal condition, his health?

A. Well, yes, he was in my place most ever night; I had an apartment house, and there ar eight or ten railroad men living there, and he woul come and call them at different numbers, and us my telephone.

Q. What would you say was the state of hi health, physically, during those eight or ten year you knew him?

A. He was in good shape.

Q. During that time did he ever give any indica tion of anything being wrong with him mentally?

A. No, he did not.

Q. Do you know what his drinking habits were if any?

A. Well, I know he would take a drink, but never saw him under the influence of liquor.

Mr. Sharp: That is all.

Mr. Alexander: No questions.

MRS. SADIE BOURN,

Called for the Claimant; Sworn.

Mr. Sharp: Q. You are the mother of Earl Brashear, the deceased, Mrs. Bourn?

A. Yes.

Q. You lived at your son's house after his marriage?

A. Yes.

Q. Did you live at the house of your son and your daughter-in-law?

A. Yes.

Q. During all of the time they were married?

A. Yes.

Q. During that time was there any time during which your daughter-in-law did not live at home?

A. A week or ten days.

Q. Where was she then?

A. At her brother's.

Q. During all of their married life she lived at home with her children and with her husband?

A. Yes.

Q. What was your son's physical condition with respect to his health and habits?

A. Very good health.

Q. Was he ever sick at all?

A. No. [191]

Q. As a young man was he interested in athletics and sports?

A. Yes.

Q. In what?

(Testimony of Mrs. Sadie Bourn.)

A. Well, he was a strong swimmer and he was always interested in various school sports.

Q. Now, did your son at any time during his lifetime show anything wrong with his head?

A. No.

Q. Is there any mental trouble in your family on either side?

A. No.

Q. Do you know what Earl's habits were with respect to liquor?

A. Well, he would take a drink, but he was not what I would call a heavy drinker.

Q. Did he ever come home under the influence of liquor?

A. He would never come home drunk, but occasionally you could tell he had been drinking.

Q. Can you tell the Court what your son's habits were with respect to studying or to work?

A. From the time he was a boy he was always studying, and he always worked until the depression.

Q. You say he worked steadily until the depression?

A. Yes.

Q. Then what did he do?

A. Then he would go out and get odd jobs.

Q. Did I understand you to say that you lived with Earl and his wife all the time they were married?

A. Yes.

(Testimony of Mrs. Sadie Bourn.)

Q. Do you know what Earl did with the money he made while he was working?

A. He gave it to his wife.

Q. What were you doing at the time, were you working?

A. Well, I was working at private families most of the time.

Mr. Sharp: That is all.

Mr. Alexander: No cross examination.

Mr. Sharp: That is Claimant's case.

STEWART J. MACKIE,

called for the Petitioner; Sworn.

The Court: What is your business or occupation?

A. Chief Clerk of the Northwestern Pacific. [192]

Q. What are your duties?

A. Supervision over the office work and records.

Q. Did you bring records along with you?

A. Yes.

Mr. Alexander: Q. Will you give me the figures now with relation to earning capacity of Earl Crashear?

A. I am not in a position to state, for the reason that all we have any record of is his earnings while employed in the mechanical department.

Q. What period of time does it cover?

A. 1929 to 1931, inclusive.

(Testimony of Stewart J. Mackie.)

Q. That is all the record you have there?

A. Yes—Oh, no, I will take that back. We have service records of locomotive firemen and mechanical department which covers the three branches of the service in which he was employed.

Q. State the period of time and what the record discloses.

A. I have the total earnings while employed by the Northwestern Pacific.

Mr. Sharp: If he has the record why not put it in.

Mr. Alexander: I will offer to put in the entire record.

Mr. Sharp: I am willing right now that a copy of the record be put in evidence.

Mr. Alexander: What does the record disclose?

A. It discloses his earnings while employed by the Northwestern Pacific in all capacities for the years 1929, 1930 and 1931.

Q. Covering the period of time that he was employed what does that record disclose?

A. It shows, for example, in the year 1929 total earnings $720.92, and for the year 1930—I am just giving round figures—$1115, and in 1931 $400.

Q. And that is regular employment, or irregular?

A. Regular employment during part of the time. It shows steady employment for a portion of 1929. The balance of the time it was more or less irregular. [193]

Mr. Sharp: Might I examine him?

(Testimony of Stewart J. Mackie.)

Mr. Alexander: You may on those figures.

Mr. Sharp: Q. What department was Brashear employed in during the month of July, 1929?

A. He was employed in the Transportation Department as locomotive fireman.

Q. How much did he make as locomotive fireman?

A. He made $9.78.

Q. How many days service does that represent?

A. I don't know.

Q. That indicates he was not a regular employee?

A. In all probability.

Q. Did you say $9.78?

A. Yes.

Q. That was probably one day's work in the month of July?

A. Yes.

Q. Does that show him doing any work in the mechanical department?

A. Yes.

Q. How much?

A. It appears to be approximately a full month's earnings.

Q. How much was it?

A. $127.91.

Q. That was in the month of July, 1929?

A. That is right.

Q. Now, in the month of August, 1929.

(Testimony of Stewart J. Mackie.)

A. Excuse me, that is not correct. I have go that wrong. In the month of July, 1929 he made $34

Q. How many days' work does that indicate?

A. Probably about six.

Q. Six days in the whole month?

A. Yes.

Q. Now, in the month of August in what depart ment was he employed?

A. He was employed in the transportation de partment as locomotive fireman.

Q. How much did he make in the month of Au gust?

A. $214.52.

Q. Now, was that full employment?

A. I don't know. That appears to be full em ployment.

Q. Now, in the month of September, 1929 wha department was he employed in?

A. In the transportation department as locomo tive fireman. [194]

Q. How much did he make as a locomotiv fireman?

A. He made about $180.

Q. What month?

A. In the month of September—no, in the mont of September, 1929, $203.41.

Q. And was that for the full month's work?

A. It appears to be.

Q. As a matter of fact, didn't he also have a day's work in the mechanical department?

(Testimony of Stewart J. Mackie.)

A. Yes.

Q. He made $10.14?

A. Possibly two days.

Q. So that in addition to the $203.41 he made as locomotive fireman he made $10.14 in the mechanical department, or a total in that month of $213.55?

A. That is correct.

Q. In the month of October what was he employed as?

A. As locomotive fireman.

Q. How often and how much?

A. He earned $131 as locomotive fireman.

Q. Isn't it $132.16?

A. $132.16, and in the mechanical department he earned $55.77.

Q. So that in the month of October, 1929 he made $187.93?

A. That is correct.

Q. You don't know whether that was full employment or not, do you?

A. It appears to be full employment.

Q. In the month of November, 1929 what do you have him employed as?

A. Locomotive fireman.

Q. How much as fireman?

A. $38.59.

Q. Does that indicate part employment?

A. Part employment.

Q. Did he work in any other department?

A. He worked in the mechanical department.

(Testimony of Stewart J. Mackie.)

Q. How much did he make?

A. $20.28.

Q. In December, 1929, in what department hav you him working?

A. Transportation, locomotive fireman, $2.46.

Q. Didn't he work in the last half of Decembe a couple of days, mak- [195] ing $30.06?

A. No, not that I am aware of.

Mr. Alexander: May this record be left here fo identification temporarily?

Mr. Sharp: I have no objection if the witness ha none.

Mr. Alexander: I want them turned over to th Court. They were brought here under process.

The Court: What have you in mind in referenc to the records?

Mr. Alexander: I have in mind the names of cer tain witnesses, to bring them to court to show th reason for discharge. I thought this witness woul be able to testify. The names are given in th report.

The Court: You may get them before he leaves. do not want to be responsible for the records. W will take an adjournment now until Tuesday morn ing at ten o'clock.

(An adjournment was here taken until Tuesday March 15, 1938, at ten o'clock a. m.) [196]

Tuesday, March 15, 1938.

Mr. Alexander: When we adjourned on Friday Mr. Sharp had me inquire regarding the insurance coverage, workmen's compensation coverage, and at that time he said that he would accept my report. Are you willing to, Mr. Sharp?

Mr. Sharp: I will take your word.

Mr. Alexander: The original policy has been described, but I went to the company which issued a policy and had a copy of it and all of the endorsements, and I find that at the time of this accident the petitioner in this case carried workmen's compensation insurance coverage both under the State law and under the Federal law; in other words, full workmen's compensation was covered under both the State and Federal law.

O. B. CAVANAUGH,

called for the Petitioner; Sworn.

Mr. Alexander: Q. Mr. Cavanaugh, may I ask your business?

A. Master mechanic for the Northwestern Pacific Railroad Company.

Q. Will you tell us what the duties of a master mechanic of that railroad are?

A. I have supervision over the maintenance of all of the rolling equipment, including machinery.

Q. Did you know Earl Bashear in his lifetime?

A. I did.

(Testimony of O. B. Cavanaugh.)

Q. Do you remember when he worked for the Northwestern Pacific Railroad?

A. Yes.

Q. About what time was that?

A. He came with us early in the year 1929 and worked until October 5, 1931.

Q. He ceased working for the railroad in October?

A. Yes.

Q. For what reason?

A. He was discharged for violation of Rule G.

Q. What is Rule G?

A. The use of intoxicants or narcotics is strictly prohibited, their use or the frequenting of places in which they are sold is sufficient cause for dismissal. I think that is [197] quoting the rule almost exactly—there may be one or two other words.

Q. Prior to his dismissal was any infraction of that rule known to you?

A. I had received reports.

Mr. Sharp: Just a moment, I have no objection to the witness testifying to what he knows of his own knowledge, but I would object to what he was told as incompetent and hearsay.

The Court: The ultimate fact is he was discharged for that reason. Proceed.

Mr. Alexander: I ask if you made any personal observation of him while he was on duty as to his condition?

A. Not prior to the date he was discharged.

(Testimony of O. B. Cavanaugh.)

Q. On the date of his discharge did you personally make any observation.

A. Yes.

Q. What was that observation?

A. Well, I found him to be drinking.

Q. On duty?

A. On duty.

Mr. Alexander: You may cross-examine.

Cross Examination

Mr. Sharp: Q. Mr. Cavanaugh, you stated that Mr. Brashear had been employed under your direction with the company since 1929?

A. Yes.

Q. You knew him personally during that time?

A. Yes.

Q. You knew, as a matter of fact, however, that he had been with the company in other capacities since 1923?

A. I did not know that.

Q. At the time he came to you were there not transmitted to you his personal record prior to that time? Aren't such records in the master mechanic's file now?

A. No, they are not in my file. They are in the files of the superintendent.

Q. At the time he came to you the personal files were delivered to you as part of the master mechanic's files, were they not?

A. Yes.

(Testimony of O. B. Cavanaugh.)

Q. And as a matter of fact you know from those files that he had been [198] with the company since 1923?

A. I could have determined that by reviewing the files, yes.

Q. Irrespective of date, it was some years prior to the time he came to your department: is that correct?

A. Yes.

The Court: Have you any knowledge of when he was working for the company before he came to your department?

A. No, I do not recall at the present time.

Mr. Sharp: Q. During the time he was in your department he came under your personal observation, or you saw him while working, a good many times?

A. Yes.

Q. If he had been then under the influence of liquor at any time during the years he was under your supervision he would have been discharged, would he not?

A. Well, they are not always discharged for the first offense.

Q. Well, if it was more than one offense he would be discharged as a matter of course?

A. He would be given a hearing.

Q. As a matter of fact, during the years he was under your supervision, in your department, you personally, at no time observed him under the influence of liquor: isn't that correct?

(Testimony of O. B. Cavanaugh.)

A. Prior to the time that he was discharged?

A. That is correct.

Q. And the only time that they saw him with liquor or under the influence of liquor during the years he was in your department was on the date that you discharged him?

A. Yes.

Q. Now, as a matter of fact, under the practice of your company, isn't it possible for a man after being discharged under these circumstances to apply for reinstatement?

A. It is possible.

Q. In some cases men are reinstated, under the circumstances under which you discharged Brashear?

A. I don't recall any in the mechanical department.

Q. But as part of the practice of the company men have been reinstated under those circumstances?

A. I could not say positively. [199]

Q. Do you know what place Mr. Brashear had on the seniority list at this time?

A. No, I could not say positively.

Q. If I showed you a seniority list as of that date would you be able to identify it?

A. I think so.

Q. It is part of the practice of your company with respect to its employees that the men are given physical examinations at the time they are taken

(Testimony of O. B. Cavanaugh.)

into employemnt, and frequently during the course of their employment?

A. Yes.

Q. And if there had been anything wrong with Mr. Brashear would he have been employed for the job for which you employed him?

Mr. Alexander: Object to that as calling for speculation.

The Court: The objection will be sustained.

Mr. Sharp: Q. As a matter of fact, do you know whether there was any physical or mental impairment with respect to Mr. Brashear's health or physical or mental condition at any time he was employed under your observation?

A. I don't know of any.

Q. I hand you here a paper which is headed "Seniority List, Firemen, 1931," and ask you if you recognize that.

A. Yes, that appears to be a seniority list.

Q. What number is Mr. Brashear on that list?

A. 74.

Q. How many are there on that list?

A. 89.

Q. Mr. Brashear was fifteen from the bottom?

A. That is right.

Q. A man who was No. 74 in this seniority list would have had what opportunity for regular employment during the years 1932 and 1933?

A. I could not say positively.

Q. Would he have had any opportunity for regular employment?

Testimony of O. B. Cavanaugh.)

A. If there was work available he would have gotten his work in the order of seniority.

Q. Do you know Mr. Richard B. Cavanaugh?

A. Yes.

Q. Do you know he is No. 75 on this list next to Mr. Brashear?

A. I don't know that positively without referring to the list. [200]

Q. Do you know whether he had regular employment in the years 1932 and 1933?

Mr. Alexander: To which we object as going into collateral matters.

Mr. Sharp: The purpose of the question is to show that with Mr. Brashear's place on the seniority list he was not entitled to and would not have as a matter of fact had regular employment during the years 1932 and 1933, and that is corroborative of Mr. Brashear's testimony that he worked on the railroad and worked elsewhere when he could not, and in order to explain why he was not continuously employed on the railroad.

The Court: I will sustain the objection.

Mr. Sharp: Q. You knew when Mr. Brashear was employed, did you not, in 1929, that he not only had worked for your company, but the record disclosed that he had also been at sea a number of times as a fireman?

A. Yes, he had had experience as a fireman.

Q. Both at sea and on land?

A. Yes, I think that is right.

(Testimony of O. B. Cavanaugh.)

Q. Do you know whether or not he went to sea after he left the Northwestern Pacific?

A. I do not.

Mr. Sharp: That is all.

Mr. Alexander: Might I ask a question of Mrs. Brashear which I omitted on cross-examination?

The Court: Yes.

Mr. Sharp: I have no objection.

HAZEL BRASHEAR,

Recalled for Further Cross-examination.

Mr. Alexander: Q. Mrs. Brashear, when I asked you some questions last Friday I read a portion of the record at the inquest and there were one or two portions that I failed to call your attention to. [201] Will you read the first two lines on page 13 to yourself?

A. Yes.

Q. At the Coroner's Inquest I will ask you if you testified as follows:

"Coroner (To Mrs. Brashear): Mr. Brashear was a man that drank, wasn't he?

A. Yes.

"Q. Quite heavily at times?

A. Not to excess."

Testimony of Hazel Brashear.)

Did you give that testimony?

A. I really don't know, I was so nervous at the me that I don't remember.

Q. What was Mr. Brashear's health prior to his eath?

A. He was always in good health.

Q. As a matter of fact, didn't you feel that he as not husky?

A. He was not a very big man, he was just small uild.

Q. I will ask you to read from page 12 of the oroner's Inquest, lines 7 to 9.

A. He was just a small build man.

Q. I will read it to you first and then ask if you id not give this testimony:

"Q. Was Mr. Brashear's health good lately?

A. It was just fairly good.

"Q. He wasn't a husky man?

A. No."

A. I did not give it in that tone of voice.

Mr. Alexander: I think that is all.

Mr. Sharp: There is just one question, Mrs. Brashear, do you know whether your husband died s a result of drowning?

Mr. Alexander: I will stipulate he died as a re- ult of drowning. The reason I hesitated there is here was some question in the report as to whether e died from drowning and other causes, but I hink I will stipulate to that.

(Testimony of Carl Vogel.)

Mr. Sharp: I have no objection to the report of the Coroner going in evidence, if you wish.

The Court: Call your next witness. [202]

CARL VOGEL,

Called for the Petitioner; Sworn.

Mr. Alexander: Q. Mr. Vogel, will you please state what your business is?

A. I am a leverman on a dredge, I am an operator.

Q. Were you on the dredge "Carson" about the 16th or 17th of May, 1934?

A. Yes.

Q. What work were you doing there?

A. We were digging a canal.

Q. Digging a canal to the shore?

A. Yes.

Q. That is, to make a place where boats could get into Hamilton Field?

A. Yes.

Q. Were you digging from the sea side toward the land?

A. We were digging from the sea side toward the shore.

Q. Toward the shore?

A. Yes.

Q. In other words, not from the shore toward the sea?

A. No.

(Testimony of Carl Vogel.)

Q. Now, do you remember seeing Earl Brashear a midnight of the 16th of May—you probably don't remember these dates, but the evidence is somewhere around midnight of the 16th or morning of the 17th of May.

A. Yes.

Q. Did you see Mr. Brashear about that time?

A. Yes.

Q. What work had you been doing up to midnight of the 16th of May, 1934?

A. We were digging canal.

Q. What work were you personally doing on the dredge?

A. I was lever man.

Q. What time did you go off duty?

A. 12 o'clock.

Q. Midnight?

A. 12 o'clock, midnight.

Q. After going off duty did you see Earl Brashear?

A. Yes.

Q. Where was he?

A. On the launch tied to the stern of the dredge.

Q. Who was with you at the time?

A. The fireman on my shift.

Q. Was that Mr. Fancort?

A. Jack—I don't know what his last name was.

[203]

Q. Was he the gentleman that testified, Mr. Fancort?

(Testimony of Carl Vogel.)

A. Yes.

Q. Was that the man?

A. Yes.

Q. That was John Fancort?

A. Yes.

Q. Did you go onto the launch with Mr. Fancort?

A. No, I did not go on; somebody had to hold the launch in so as to get the man off.

Q. At any rate, you gave assistance of some kind?

A. Yes.

Q. Did Mr. Brashear come back onto the dredge?

A. First when we called him he would not come, one man had to go down and get him.

Q. Did he come back with the man that went down?

A. Yes.

Q. Did he get back onto the dredge?

A. Yes.

Q. Then where did he go?

A. We took him into the fire-room.

Q. That is an enclosed room on the dredge?

A. Yes.

Q. Were the doors closed?

A. Yes.

Q. Now, as you went in there with him what did he do?

A. Well, he did nothing, he was sitting on the bench quiet.

(Testimony of Carl Vogel.)

Q. How many were in there with him?

A. Just me and Jack.

Q. You and Jack, that is Mr. Fancort?

A. Yes.

Q. About how long did you stay?

A. I should say anywhere from 45 minutes past 2 to one o'clock—I would not be sure.

Q. Was he quiet during that time?

A. Yes.

Q. Then what did you do?

A. Well, I asked Jack if he needed any more elp and he said no, he could take care of the man y himself.

Q. So then you went up to your bunk?

A. I went up to my bunk.

Q. Later on did you see him again?

A. Well, I saw him in the water.

Q. That was about what time?

A. Anywhere between half past four and five, should say closer to five than half past four.

Q. You heard a commotion of some kind, noise f some kind?

A. Yes.

Q. Did you go on the deck of the dredge?

A. Yes.

Q. He was in the water then?

A. He was in the water then.

Q. What did the men do to let him save himself r help him?

(Testimony of Carl Vogel.)

A. When I came out on deck the plank was overboard. I didn't see [204] when the plank was thrown overboard.

Q. Did it go up to where the man was?

A. Yes.

Q. What did the man do?

A. He swam away from it.

Q. He went away from the plank?

A. Yes.

Q. Was the plank big enough for him to hold on to it?

A. It was between 16 and 18 feet long.

Q. But he swam away from the plank?

A. Yes.

Q. Do you know whether he dived down or not?

A. No, I could not say.

Q. How many planks were put out, do you remember?

A. I think there was a small plank thrown out after that, it was not a big plank, it was about six or eight feet.

Q. Were any lines thrown out?

A. One heaving line.

Q. A heaving line was thrown out?

A. Yes.

Q. Did he make any effort to take that?

A. No.

Q. How long had you been on that dredge?

A. Well, I am not sure but I think about two months.

Testimony of Carl Vogel.)

Q. Do you know whether there was a life buoy n the deck?

A. Yes.

Mr. Sharp: Just a minute. I object to that ques-on on the ground it refers to an occasion prior to is particular occasion.

Mr. Alexander: I will come right down to the me.

A. On the night that this happened was there life buoy on the deck of the dredge?

A. Yes.

Q. Will you describe that life buoy?

A. Well, it looked something like a bow-knot.

Mr. Alexander: You may cross-examine.

Cross Examination.

Mr. Sharp: Q. Where was this life preserver?

A. It was on the bow of the dredge, on the bow f the house.

Q. I show you here some pictures which are in vidence as Claimant's Exhibits 2 to 6, and ask you f you can show me where it was. [205]

Mr. Alexander: These pictures were taken in 937, weren't they?

Mr. Sharp: I really don't know.

Mr. Alexander: I think they were.

Mr. Sharp: I am asking him where on the picture he life preserver was that night, if it was there.

A. It is not on there.

Q. You are referring to Claimant's Exhibit 3?

A. It was not on there.

(Testimony of Carl Vogel.)

Q. And it was not on the portion shown by Exhibits 4 or 5?

A. No.

Q. I now refer you to Claimant's Exhibit 6.

A. This is the stern, and it was not on there.

Q. Will you tell me again where it was?

A. On the bow of the machine.

Q. On the bow of the machine?

A. Where the house is.

Q. On the house?

A. Yes.

Q. Off what part of the boat was Mr. Brashea at the time you came and saw him in the water?

A. He was off the stern.

Q. How far was it from that part of the boa to where the life buoy was?

A. Well, I don't know how long the boat is.

The Court: Approximately?

A. 50 feet.

Mr. Sharp: Q. It was the full length of th boat?

A. No, it was not.

Q. Was it on the same deck, or did you have t go up?

A. No, it was on the same deck.

Q. On that night did you make any attempt t go for this life buoy, yourself?

A. No.

Q. Did you suggest to anyone else, "Let u throw over a life buoy instead of a plank"? Di you think of it, at all?

(Testimony of Carl Vogel.)

A. I thought of it, but as the man was not taking hold of the plank, what is the use of throwing the life buoy over? The plank is bigger than the life buoy. [206]

Q. What sort of a heaving line was it that you referred to as having been thrown overboard?

A. It is a small line about the thickness of the little finger.

Q. It has lead on it?

A. No, it has a kind of knot.

Q. The ordinary heaving line has lead on one end?

A. That is a sounding line, it sinks in the water.

Q. At the time that you found Mr. Brashear on the launch was there any man other than Mr. Brashear on the launch?

A. No.

Q. Do you know whether the engines were going on the launch?

A. No.

Q. You don't know whether they were going, or not?

A. Well, I know they were not going.

Q. You know they were not going and the launch could not have been used at that time?

A. No.

Q. How many men were on the launch at the time of this episode?

A. How many men were on the dredge?

Q. How many members of the crew lived on the dredge?

(Testimony of Carl Vogel.)

A. I should say 14.

Q. 14 men?

A. I would not say for sure.

Q. About 14, I do not care for the exact number, but they lived on the boat and ate on the boat?

A. Yes.

Q. Did you have a galley?

A. Yes.

The Court: What was this launch?

A. The launch was there for the men if they wanted to go ashore, a tender for the dredge.

Q. Where was that in relation to the dredge?

A. It was tied on the stern of the dredge.

Mr. Sharp: Q. How long would it have taken to get the launch started, do you know?

A. I don't know how long.

Q. Were there any lifeboats or row boats on the dredge?

A. There was one smashed up.

Q. How big was that, the one that was smashed up?

A. It held about six or seven men. [207]

Q. That rowboat held about six or seven men?

A. Yes, if you wanted to fill the boat up.

Q. There was no other boat except that smashed boat?

A. No.

Q. Do you remember what day that boat was smashed?

(Testimony of Carl Vogel.)

A. I believe it was the night before the accident, before the man jumped overboard, but I really don't know.

Q. When you saw Mr. Brashear on the launch, why did you take an interest in his being or not being there?

A. Well, because we heard the noise, I thought there was something wrong, and I said to Jack there was somebody on the launch, let us take him off.

Q. Were you afraid he was going to jump overboard or something?

A. I was not.

Q. Why were you personally concerned in taking him off?

A. Because I would do the same for anybody.

Q. Just why did you not want him on the launch?

A. Because, in the first place he had no business on the launch.

Q. Was it part of your job to keep people off the launch?

A. No, it was not.

Q. Then why did you go after Brashear when you saw him on the launch? Was he acting in a peculiar way?

A. No.

Q. You just saw him there and decided you did not want him there and decided to take him off?

(Testimony of Carl Vogel.)

A. I did not take him off by myself; Jack ha just as much to do with it, but he had no busines on the launch.

Q. It was no part of your duties to keep any body off the launch?

A. No.

Q. You do not want to tell the Court why yo and Fancort wanted to take him off?

A. We wanted to get him off the launch.

Q. Isn't it a fact that Brashear was acting ver peculiar, and you and Fancort thought that fello was going to jump overboard if you did not get hi back in?

A. No. [208]

Q. When you got him off the launch you staye there with him, and you didn't think he was goin to jump overboard?

A. No, he didn't act like he was going to jum overboard in the fire-room.

Q. Why did you stick around for an hour?

A. I wanted to be around in case somethin should happen.

Q. What were you afraid would happen?

A. He had no business on the launch, that is a I know.

Q. Why did you stay an hour with him in th fire-room?

A. I stayed with Jack.

Q. Just for sociability sake?

A. Yes.

(Testimony of Carl Vogel.)

Q. So when you asked Jack "Is it all right for me to leave you alone with him," you mean it was all right to leave for sociability sake?

A. No, not in that way.

Q. Isn't is a fact, Mr. Vogel, that Brashear was acting peculiar on the launch, he was acting peculiar in the room, and you thought that you would help Fancort to take care of and keep him from jumping overboard?

A. No.

The Court: Q. How long had you known Fancort?

A. I didn't know the man until I came on board.

Mr. Sharp: Q. You didn't know Mr. Fancort until he came on board?

A. No.

Q. You didn't know Mr. Brashear until he came on board?

A. No.

Q. Neither were friends of yours?

A. No.

Q. Yet, as I understand your testimony, you saw Mr. Brashear on the launch?

A. Yes.

Q. And it took the two of you to get him off?

A. It did not take two, but one had to hold the bat.

Q. You asked him to come off?

A. Yes.

(Testimony of Carl Vogel.)

Q. And he would not do it?

A. No.

Q. And you went after him?

A. Yes.

Q. Then you took him into the fire-room?

A. Yes. [209]

Q. And then the two of you stayed with Bra shear for an hour, isn't that right?

A. Yes.

Q. It was your bedtime, was it not?

A. Yes.

Q. Instead of staying in bed you stayed ther with Fancort for an hour?

A. Yes.

Q. You did not leave until after Fancort sai it was safe for you to leave him alone, isn't tha true?

A. Yes.

Q. What did you mean when you asked Jac "Is it safe for me to leave you alone with Bra shear"?

A. I didn't ask him if it was safe. I asked hir if he needed my help.

The Court: What did you mean by "if he neede your help"?

A. If the man went on the launch again, didn't know if the man was going out there again he had no business on the launch.

Mr. Sharp: Q. So in spite of the fact it wa none of your business or part of your dutie whether anybody was on the launch or not, in spit

(Testimony of Carl Vogel.)

o the fact that this man was not a friend of yours, ou made it your business to see he would not go ack on the launch again: is that what you want te Court to understand?

A. If you want to word it that way.

The Court: Q. When did you first learn he was a the launch?

A. Well, after twelve o'clock, after I got trough, I heard something.

Q. You heard some noise?

A. Yes.

Q. What noise did you hear?

A. We heard a noise.

Q. Who?

A. Me and the fireman.

Q. What was it?

A. Well, we heard a noise, and then Jack knew ight away it was Brashear, and then I went down ad held the launch in, because the launch was way a couple of feet, and Jack stepped on the lunch and helped him up.

Mr. Sharp: Q. Why did he need help?

A. Because he wouldn't come.

Q. Why wouldn't he come?

A. He wouldn't give an answer. [210]

Q. Who called him?

A. Jack.

Q. Did he call him a number of times?

A. Yes.

Q. He didn't even answer?

(Testimony of Carl Vogel.)

A. No.

Q. And then he went over on the launch?

A. Yes.

Q. And what happened?

A. Jack took him by the arm and the man can right up.

Q. Did either you or Jack talk to him?

A. Jack talked to him because Jack knew hin

Q. All right, what did Jack say?

A. Jack wanted to know what he wanted on th launch and he would not answer.

Q. Did you say anything at all?

A. No.

Q. At any time?

A. No.

Q. What did Jack say?

A. Jack said he was going to stay up with hi all night.

Q. Why was Jack going to stay up all night?

A. Because he couldn't get anything out of hin he did not say why; he would not do this and wou' not do that.

Q. He did not answer either one of you at ar time?

A. No.

Q. You heard Mr. Fancort testify that the tw of you went down there and you saw Brashea kneeling and mumbling in the boat?

A. Not on the launch.

Q. Where was that?

(Testimony of Carl Vogel.)

A. That was afterwards.

Q. You did not see what Mr. Fancort testified t on the launch?

A. No. I did not see him kneeling on the launch.

Q. You did not hear him mumbling?

A. No.

Mr. Sharp: That is all.

DANIEL FORSYTH,

alled for the Petitioner; Sworn.

Mr. Alexander: Q. Captain Forsyth, will you lease state your age?

A. I will be 59 my next birthday. [211]

Q. What is your business?

A. Dredgeman.

Q. How long have you been a dredgeman?

A. Just about 40 years.

Q. 40 years?

A. Yes.

Q. You know the dredge "Carson"?

A. Since 1910.

Q. From 1910?

A. Yes.

Q. Down to date?

A. Well, up to Mr. Haas' selling the dredger.

Q. You are with the people that own that dredge ow, on the same dredge?

A. Yes, I went back to them.

(Testimony of Daniel Forsyth.)

Q. You know when the dredge was at Hamilton Field, do you not?

A. Yes.

Q. Where was the dredge before it went there?

A. It was at Libby-McNeill's, close to Thornton.

Q. Then it went up to this job in May?

A. Well, we came there and worked there a while, and then we came back, and Mr. Haas had a job at the transport dock, and we came back and worked there, finished that work, and then went back to Hamilton Field and finished up.

Q. You were in charge of the work digging a channel to Hamilton Field?

A. We dug the channel.

Q. I mean as far as the dredging, itself, was concerned, you were in charge of the dredge?

A. Yes.

Q. We are concerned here with something that happened on the 16th or early morning of May 17, 1934. You were making a new channel to Hamilton Field, were you?

A. Yes.

Q. And were going toward the shore?

A. Yes, we were dredging from offshore toward the land.

Q. Before taking the dredge "Carson" up there was the dredge all right, in proper condition?

A. Yes.

Q. Properly manned?

A. Yes.

(Testimony of Daniel Forsyth.)

Q. How many men were on board for the work?

A. I would say around 12 or 14.

Q. Was she properly equipped and supplied for the work?

A. Well, we just go off the ways at Crowley's shipyard, had a lot of extra [212] caulking and overhauling.

Q. So she was in good condition?

A. Perfect.

Q. Did she continue that way up to the time Mr. Brashear died?

A. Yes.

Q. When you went out was there a boat taken along?

A. Yes, we always have a boat.

Q. On the morning of the 17th of May of 1934 what was the condition of the boat?

A. Well, it was not good at that time.

Q. Why?

A. That night we had a very heavy north wind and we pulled the boat onto the port side of the dredge, and that night the leverman pulled the spud out that holds the machine when you are operating, and that fell on the boat and broke both sides of it.

Q. So in the early morning of the 17th the boat was not fit for use?

A. No.

Q. When you discovered the condition of the boat what did you do?

A. Well, we went to work on the boat that morning, and in the afternoon we went to town and

(Testimony of Daniel Forsyth.)

ordered lumber for the boat, and on Sunday the boat was in operation, because I went to San Rafael in it.

Q. In other words, after this accident happened and damaged the boat you got the boat repaired right away?

A. Yes, but in the meantime, I believe it was the day before, or after, I could not say now, it is so long ago, Mr. Haas came out with an extra man and he brought a boat and left that boat with us, and went back in the launch, and that boat stayed with us until mine was repaired.

Q. In other words, you got another boat as soon as possible?

A. Yes.

Q. There has been some talk here about life rings or life preservers. Will you tell us whether there was or was not a life ring or life preserver on board?

A. We always did have one, and there still is one hanging on the machine at the same place now it is always there; it was hanging there continuously all the time.

Q. And you testify that was true on the morning of the 17th of May, 1934?

A. Yes. [213]

Q. You showed me some pictures this morning. Have you those with you?

A. Yes, right here, and this will give you an idea.

Testimony of Daniel Forsyth.)

Q. You brought these from your home?

A. Yes, they were taken with our own camera. hat is a picture taken in 1930, the one you are ›oking at.

Q. First of all I have one that has the figure 29" on the back. Is that the lifering—what do you ıll it?

A. Well, that is what they call the life buoy.

Q. Is that the common ring life buoy?

A. Yes.

Q. That was on the dredge?

A. Yes.

Q. Is this the dredge "Carson"?

A. Yes.

Q. Was there a life buoy like that on the dredge ıe night that Mr. Brashear was drowned?

A. Yes.

Mr. Alexander: We offer this in evidence.

The Court: It is admitted.

(The photograph was marked "Petitioner's Exibit A.")

Mr. Alexander: I will show you another picture, aptain. What is that I am pointing to?

A. That is a life buoy on the port side.

Q. I am pointing to a picture that has "225" ı the back, and that shows the life buoy in posion?

A. Yes.

Q. And was it in that position on the night that Ir. Brashear died?

(Testimony of Daniel Forsyth.)

A. Yes.

Q. Was it in good condition for use?

A. Yes.

Mr. Alexander: We offer that in evidence, your Honor.

(The photograph was marked "Petitioner's Exhibit B.")

Mr. Sharp: There is no attempt to indicate that these pictures were taken in the month of may 1934?

Mr. Alexander: Oh, no. They were probably taken a couple of years before.

Mr. Sharp: They do not indicate the condition on the night in [214] question. I have no objection to their going in.

Mr. Alexander: Q. On the night that Mr. Brashear was drowned was the life buoy in the position as indicated on this picture?

A. Yes.

Q. That is Petitioner's Exhibit B.

A. Yes.

Q. The dredge you have spoken of is not a self propelling dredge, is it?

A. No.

Q. It has to be towed from one job to another?

A. Yes.

Q. When did you first learn about Earl Brashear?

A. I think it was a Sunday when Mr. Fancort brought him aboard; I did not have anything to do

(Testimony of Daniel Forsyth.)

ith hiring men, it was all C. W. A. work; they id all the hiring and got the men and brought iem there; they had to hire them in the same ounty they worked in.

Q. About how long had he been on board before ie accident?

A. It was not over three or four days, I should ay.

Q. Somewhere around there?

A. Yes.

Q. Now, taking the early morning of May 17, 934, when did you hear or learn anything about Ir. Brashear being in the water? Let me reframe iat question. I want to go back for a moment. In ie early morning of May 17th did you learn anyhing about Mr. Brashear?

A. Yes.

Q. In what way?

A. Mr. Fancort called me.

Q. About what time was that?

A. Well, I should judge around about three 'clock or a little later; I did not pay much attenion to the time.

Q. Anyhow, it was somewhere in the early orning hours?

A. Yes.

Q. At that time what did he tell you?

A. He told me he was in pretty bad shape; he sked me what we were going to do with him, and asked him, "Can you take care of him?" He said,

(Testimony of Daniel Forsyth.)

"Why"—he says "he is getting along better now than he was." Then he spoke of taking him in, we would take him in with the boat, and I said, "You cannot get in with the boat, the tide is too low," the tide was ebbing, "and [215] you can't get him in until," it would have been around eight or nine o'clock, before we could have gotten the man in, if we went over the bar.

Q. You speak of the bar. You are talking of Hamilton Field, are you?

A. Yes.

Q. At that time Hamilton Field had not been completed, had it?

A. No.

Q. About how far from shore were buildings going on?

A. They were three miles from us; we were digging a channel three miles out.

Q. Did you know whether or not there was a hospital there?

A. I think they were building it then, it was not finished.

Q. But you spoke of a bar, what do you mean by a bar?

A. Well, this was dry at low tide, that is what you call a bar.

Q. A sand bar?

A. A mud flat.

Q. You mean that you could not get into Hamilton Field at that time?

(Testimony of Daniel Forsyth.)

A. Yes.

Q. About what time did you think you could get in?

A. I thought we could get in about half past eight or nine o'clock.

Q. What prevented you using the launch?

A. We were sending the launch over to McNear's Point for fresh water.

Q. Was there any help to be got at McNear's Point?

A. No, they were not operating then; there was no one there but a watchman.

Q. When the launch came back with the water that would be about between eight and nine; is that right?

A. He would have got back sooner, but we would have to wait until that time so that we could have gotten to Hamilton Field.

Q. In other words, you could not get the launch up to Hamilton Field until sometime after they came back with the water; is that right?

A. Yes.

Q. Did you tell Mr. Fancourt he would be taken over to Hamilton Field after the launch came back from water?

A. Yes. [216]

Q. That was your plan?

A. Yes.

Q. When Mr. Fancort reported to you about Mr. Brashear did he state whether he had quieted down, or what did he say in regard to that?

(Testimony of Daniel Forsyth.)

A. Well, he said he was pretty bad there for a while, he said maybe he could take care of him, he was going to call Pedersen.

Q. He said he was going to call another man to help him?

A. Yes.

Q. That met with your approval?

A. Well, he called him on his own hook, I guess, because he had him up with him.

Q. He had Pedersen with him at the time?

A. No, I believe he called him afterward—he called me twice that night.

Q. He called you twice?

A. Yes.

Q. The second time was when?

A. I asked him how he was, and he said he was raving pretty much, and then he got Pedersen up to help him, and I said "If you need any help I will get up, too." He said, "No, we can take care of him, there are both of us down there, and I will hold him until we take him ashore." I had been up the previous night eighteen hours, and several nights before, and I thought it was best for me to get a rest.

Q. What were Mr. Brashear's duties?

A. Fireman.

Q. Did any of the men live ashore?

A. No, not then, it was too far. You could not get them out, they had to stay there.

Q. Did you hear a commotion after he had gone overboard?

Testimony of Daniel Forsyth.)

A. No, not till Fancort called me.

Q. Then did you come on deck?

A. Well, I got up right away and came out, but did not see him, he was gone.

Q. It was too late, he had gone?

A. When I came up.

Q. You say you did not see who—Mr. Brashear?

A. I did not see him, he was gone.

Mr. Alexander: That is all.

Cross Examination.

Mr. Sharp: Q. Mr. Forsyth, the last thing you aid when Mr. [217] Alexander was examining you , about the last thing that Mr. Fancort told you as that Pedersen and he would hold Brashear ntil you were ready to go ashore with him. At that me didn't you discuss the advisability of tying im up?

A. Well, we spoke of that, but Fancort thought was not necessary, they could take care of him.

Q. You had discussed the fact with Mr. Fancort hat on a previous occasion you had tied a man up?

A. Yes, he had the snakes.

Q. And the other man had snakes?

A. Yes.

Q. Why did you discuss the question of tying im up at all? I will rephrase that. Did Mr. Fancort tell you that Brashear wanted to jump overoard, or was trying to?

A. No, he did not.

(Testimony of Daniel Forsyth.)

Q. Then why did you discuss with him the advisability of tying him up?

A. He said he had the snakes.

Q. Who said that?

A. Fancort.

Q. Did you discuss with him at all the advisability of tying him up?

A. I said "Maybe we had better tie him up," and he said, "No, I have Pedersen down there and I think we can hold him, he is quieting down, and I think he will be all right."

Q. What did Fancort tell you Brashear had been doing during that time?

A. Well, he said he was acting kind of queer.

Q. Did he tell you that he was running around praying and frothing at the mouth, acting violent?

A. Well, not violent, he was not attempting or trying to kill anybody. He was just running around out of his head.

Q. What papers do you hold, if any?

A. We do not require any on the dredger.

Q. You do not hold any papers?

A. No.

Q. Do you live on the dredge as a matter of course?

A. Well, generally I do, when I am not at home I am generally at the dredge most all the time.

Q. When you are not at home you live on the dredge?

A. Yes. [218]

(Testimony of Daniel Forsyth.)

Q. How many other men live on the dredge regularly when it is in operation?

A. Well, a full crew would be 9 to 12 men.

Q. They live on the dredge?

A. Yes.

Q. At the time of your operations at Hamilton Field the dredge was afloat on the waters of the Bay, there?

A. Certainly.

Q. It was a floating dredge?

A. Yes.

Q. It was towed around in the water?

A. Yes.

Q. It floated to the job?

A. It was towed to the job.

Q. But it floated to the job, it was not carried on something else?

A. Towed.

Q. Do you know what the depth or water was at the place to which you were towed?

A. Yes, there was around 5½ or 6 feet of water.

Q. From about that spot in you were dredging out a deeper channel to Hamilton Field?

A. Yes.

Q. That channel was being dug to enable boats to be navigated directly to Hamilton Field?

A. Well, small boats. It was not dug for any large steamers, only small cargo boats.

Q. How long did it take you to dig that channel?

A. Well, it is kind of hard to say now, but I think we were over there three weeks.

(Testimony of Daniel Forsyth.)

Q. Were you there continuously, or did you go there a while and go some place else, and then come back?

A. Yes.

Q. You were there?

A. We were there for a while, and then Mr. Haas had taken the dredge over to the Transport Dock.

Q. What were you doing at the Transport Dock?

A. Making a new slip for them.

Q. Do you know whether you received any money for that work, or not?

A. I think he lost more than he made there.

Q. But I am asking did he receive some money for the work done over there—what was this place?

A. The Transport Dock.

Q. The Transport Dock?

A. I guess he got something, I couldn't say. I didn't have anything to do with that. [219]

Q. Who was in charge of the dredge for the Union Dredging Company?

A. I, myself.

Q. Who bought the groceries for the men on board the boat?

A. I did, I sent an order to the office.

Q. Could you buy lumber and things to repair without consulting anybody else?

A. Yes, anything I wished.

Q. You could buy anything you wished without consulting anybody?

(Testimony of Daniel Forsyth.)

A. Yes.

Q. If you wanted to you could have bought a lifeboat without consulting Mr. Haas or anybody else?

A. Oh, yes, but I did not need to.

Q. But assuming that there was a need for the purchase you had the authority to buy it?

A. Yes.

Q. You say that Mr. Haas came out and left the boat while the boat was being repaired. What day was it Mr. Haas came out?

A. I think it was on Thursday.

Q. After Mr. Brashear had been drowned?

A. Yes.

Q. In other words, as soon as Mr. Haas came here and found out about this and the boat had not been repaired he went and got another one?

A. No, he left the one he came in. He brought a man out with him and the man rowed the boat out.

Q. On that date didn't Mr. Haas come out in the launch, on Thursday? Didn't Mr. Haas come out on the launch and never row out that three miles?

A. The other fellow rowed out that three miles. I couldn't say just exactly what time it was, but they got out there around close to noon.

Q. Are you sure that Mr. Haas did not come in the launch that day?

A. I could not say.

Q. He might have come out in the launch?

(Testimony of Daniel Forsyth.)

A. I could not say positively.

Q. You are not sure whether he came out in the launch or in a rowboat?

A. I know he came in the rowboat, because he left the rowboat. [220]

Q. Didn't he originally come out to the boat that morning in a launch?

A. No.

Q. Are you sure?

A. I am sure, because we had the launch ourselves.

Q. Was there any liquor on board your boat when you worked at Hamilton Field?

A. No, not that I know of.

Q. Did any of the men drink on board the boat to your knowledge?

A. No.

Q. Did Mr. Brashear at any time under your observation seem to be under the influence of liquor?

A. When him and Fancort came on the Sunday they both were feeling pretty good.

Q. You employed him notwithstanding that?

A. I did not employ him, at all.

Q. Who did employ him?

A. The inspector.

Q. Was the inspector authorized to hire men for your boat?

A. Fancort recommended this fellow and the inspector said he would bring him; we could not hire him, we had to get him from the hiring hall.

(Testimony of Daniel Forsyth.)

Q. Did you have to take anybody that they sent you?

A. Yes.

Q. Did Mr. Fancort tell you about what Brashear did when he first saw him on the launch?

A. No.

Q. Did you give any instructions to any of the men on your boat as to what to do in case the man jumped overboard?

A. No.

Q. Did you tell any of the men that there was a life preserver on your boat?

A. No, but they could see it.

Q. How many would the boat that was broken carry, do you know?

A. Four or five.

Q. This heaving line that has been spoken of earlier in this case was what type of heaving line?

A. A little small 3/8-inch line.

Q. It had a piece of lead at the end of it?

A. No, you don't use lead on a heaving line.

[221]

Q. While you were in the course of these dredging operations at Hamilton Field Mr. Haas had made arrangements to have available for you a launch, is that true?

A. Yes.

Q. And this launch was used by you to send for groceries and take men back and forth?

A. Yes.

(Testimony of Daniel Forsyth.)

Q. And buy such material as you needed?

A. Yes.

Q. And that launch was at your service at al times?

A. Yes.

Q. At the time Mr. Fancort first came up an talked to you about Brashear that launch was tie alongside, was it not?

A. Yes.

Q. But the engines were not running, wer they?

A. No, no need of burning gas.

Q. How many times had Mr. Fancort seen yo that night before Mr. Brashear went overboard?

A. Twice.

Q. What time was the first time?

A. I should judge about three o'clock.

Q. What time was the second time?

A. About half past four, I think, or five, some where around there.

Q. At half past four or five Mr. Brashear ha not yet gone overboard, had he?

A. No.

Q. What time did you hear the commotion a tending Mr. Brashear's going overboard?

A. Well, it was around about, I guess about fiv minutes to five, something like that.

Q. The time that you discussed the tying up o Mr. Brashear was the first time or the second time

A. The first.

(Testimony of Daniel Forsyth.)

Q. What else did you discuss the first time besides the question of tying up Mr. Brashear?

A. Well, we talked about taking him in, and I said there would be no use; we were talking about taking him over to McNear's Point, and I said, "There is no use taking him over there, and we had better wait until the launch comes back," when the tide would come in we would take him to Hamilton Field and some of the boys had machines there and could have run him in. [222]

Mr. Sharp: That is all.

Mr. Alexander: When Fancort told you that Mr. Brashear had the snakes, he meant by that delirium tremens?

A. Yes.

Mr. Alexander: That is all. We have no further evidence, your Honor.

Mr. Sharp: We have no further evidence, except I wish to read into the record the mortuary tables, which for convenience sake I am taking from the World's Almanac for 1938, which are figures taken from the Bureau of Census.

Mr. Alexander: Before that is done we object to the introduction of the mortuary tables in this case upon the ground that we are dealing here not with a normal individual.

(After argument.)

The Court: I will allow them subject to a motion to strike over the objection of counsel.

Mr. Alexander: Before the ruling is finally made may I add this objection to my objection, that the

(Testimony of Hazel Brashear.)

undisputed evidence shows we are not dealing wit a normal individual, because the undisputed ev dence shows that he had some form of insanity c abnormality.

The Court: The Court will allow the testimon subject to a motion to strike, over the objection c counsel, and you may note an exception.

Mr. Alexander: Exception.

Mr. Sharp: I want to say these tables are o pages 273 and 274 of the World Almanac of 193 They show the expectation of life of a man aged 2 to be 39.24 years, and of a female of the age of 2 an expectation of life of 45.10.

I would like to recall Mrs. Brashear for a m ment.

HAZEL BRASHEAR,

Recalled for Claimant.

Mr. Sharp: Do you remember the day you husband left home to [223] go to work on boa the Dredger "Carson"?

A. Yes, I do.

Q. What time of day did he leave home?

A. Monday morning about seven o'clock—M Fancort and Mr. Haas were to meet him at t corner.

Mr. Alexander: This is apparently hearsay, I am objecting to it.

A. I know it is true.

(Testimony of Hazel Brashear.)

The Court: Q. How do you know that it was Monday morning? Were you home?

A. Yes.

Q. That is the last time you saw him?

A. Yes.

Q. That was Monday morning at 7 o'clock?

A. Yes.

Q. He left home at that time?

A. Yes.

Mr. Sharp: Q. Who was there at the time?

A. My mother-in-law.

Q. What was his condition at that time?

A. He was perfectly all right. He told us the night before——

Mr. Alexander. I object to what he said as hearsay.

The Court: Yes.

Mr. Sharp: Q. Did you kiss him good-bye that morning?

A. Yes.

Q. Was there any liquor on his breath?

A. No.

Mr. Sharp: That is all.

Mr. Alexander: That is all. Have you finished your evidence?

Mr. Sharp: Yes.

Mr. Alexander: In order to conform to the rules there are certain motions that I wish to make at this

time. First of all, to protect the record we a
moving at this time to strike out all the testimo
of Mr. Haas regarding the earnings from the dred
ing contract upon the ground that it is immateri
irrelevant, and incompetent, and not freight pen
ing.

I also move at this time to strike out the eviden
of the mortuary tables upon the ground that it
immaterial, irrelevant, and incompetent in this cas
because the undisputed evidence shows we [224] a
not dealing with a normal life, but rather one th
is abnormal.

At this time, on behalf of the Union Dredgi
Company, the corporation petitioner here, we mo
for judgment in its favor upon the followin
grounds:

1. That the evidence shows that the Uni
Dredging Company, a corporation, is entitled
have its liability limited as prayed for in its pe
tion in that behalf.

2. That the Union Dredging Company, a co
poration, was the owner of the dredge at the ti
of Earl Brashear's death, and the evidence sho
that his death occurred without the privity or kno
edge of such owner, and that the amount or val
of the interest of such owner in the dredge a
freight then pending did not exceed the sum
$3375.

3. That the evidence shows that no liability e
ists in favor of the Claimant, Hazel Brashear, pe

sonally, or as administratrix of the Estate of Earl Brashear, Deceased; and likewise no liability exists in favor of the Claimants Richard Brashear and Coria Brashear, upon the ground that there was no neglect or act or omission or fault on the part of Union Dredging Company, a corporation, or the dredge "Carson", or its owners, or officers, or crew, or representatives, or master, or agents, or employees, causing the death of Earl Brashear.

4. That the death of Earl Brashear was self-inflicted and without fault on the part of anyone else.

5. That this Court has no jurisdiction to award damages or any sum to the Claimants for if said claimants are entitled to recover at all, jurisdiction of the controversy to determine their rights is vested in the Industrial Accident Commission of the State of California.

6. That this Court has no jurisdiction to award damages or any sum to the Claimants, for if said claimants are entitled to recover [225] at all, jurisdiction is vested in the United States Employees' Compensation Commission, or with Deputy Commissioner for this Compensation District, pursuant to the Longshoremen's & Harbor Workers' Compensation Act of the United States of America, and the law in that behalf made and provided, and also the Workmen's Compensation Act of the State of California.

7. That the death of Earl Brashear was due
his own acts, and no other person is responsib
for his death.

8. That said Earl Brashear assumed all of t
risks involved in the matters resulting in his deat

9. That the death of Earl Brashear was due
his own negligence proximately causing said deat

10. That the death of Earl Brashear was t
proximate result of intoxication on his part.

11. That the death of Earl Brashear was prox
mately caused by the use of alcoholic liquor.

12. That if there had been more life savi
apparatus it is pure speculation and conjectu
whether said Earl Brashear's life would have be
saved.

13. That if there had been more life saving a
paratus it would not have saved the life of Ea
Brashear, as he blocked the efforts of others to sa
him.

With the Court's permission I will file the moti
for judgment which I have just made orally.

Mr. Sharp: The only motion I wish to make,
your Honor please, is that the petition for limit
tion be denied for failure of the petitioner to su
render all freight pending. It appears from the e
dence of Mr. Haas that there was freight pendi
at the Hamilton Field contract, and from the tes
mony of Mr. Forsyth that there was money earn
during this same voyage at the Transport Doc
and that that money has not been surendered or
bond in lieu filed. [226]

Mr. Wallace: That was a matter that was referred to the Commissioner. The Commissioner passed on that.

(Thereupon counsel argued the case and it was submitted.)

[Endorsed]: Filed Aug. 1, 1938. [227]

[Title of District Court and Cause.]

NOTICE OF APPEAL
PETITION FOR ALLOWANCE OF APPEAL
ORDER ALLOWING APPEAL

To Union Dredging Company, a corporation, petitioner herein, and to Redman, Alexander & Bacon and James Wallace, its proctors, to the Clerk of the above entitled Court, and to all others concerned:

You and each of you will please take notice and you are hereby notified that Hazel Brashear, claimant herein, as administratrix of the estate of Earl Brashear, deceased, and on behalf of herself personally and on behalf of Richard Brashear and Gloria Brashear, her minor children, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the final decree of the above entitled court herein and from that decree herein dated [228] May 29, 1938 and filed May 31, 1938, which decree grants the petition of petitioner herein and denies the claim of claimant herein. Said

claimant appeals from the whole of said decree an hereby prays that her appeal may be allowed a cordingly, that citation issue herein and that suc further steps and orders may be taken herein as a meet and proper in the premises.

Dated: San Francisco, California, August 2 1938.

HONE & HONE
DERBY, SHARP, QUINBY &
TWEEDT
Proctors for Claimants and Appellan

The foregoing appeal is hereby allowed.

MICHAEL J. ROCHE
District Judg

[Endorsed]: Filed Aug. 22, 1938. [229]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Hazel Brashear, on behalf of herself personall and on behalf of claimants Richard Brashear a Gloria Brashear, and as administratrix of the esta of Earl Brashear, deceased, claimants and app lants herein, says that in the record, findings fact and conclusions of law, final decree, opinio orders and proceedings of the District Court, the are manifest and material errors, and said Ha Brashear, now makes, assigns and presents the fo lowing assignment of errors therein, on which s relies, to-wit:

I.

The District Court erred in finding for petitioner and [230] against claimant herein.

II.

The District Court erred in rendering a final decree herein in favor of petitioner and against claimant herein.

III.

The District Court erred in finding the above named dredger was properly manned, equipped, supplied and seaworthy. The District Court erred in finding that petitioner did not negligently fail to maintain said vessel as a reasonably safe place on which seamen could do their work. The District Court further erred in finding that petitioner did not negligently fail to equip said dredger and supply it with safe means, materials, appliances or devices. The District Court further erred in finding that at no time did petitioner negligently fail to supply suitable life boat, life preserver or life ring to be used for the rescue of any person going overboard. The District Court erred in not finding that in all of the respects above mentioned petitioner was in fact negligent and did negligently fail to maintain said dredger as a reasonably safe place on which seamen could do their work. The District Court erred in failing to find that the dredger was not properly supplied with safe means, materials, appliances and devices and in failing to find that said dredger was not supplied with a suitable life boat,

life preserver or life ring to be used for the rescu of persons going overboard or any other device fo the rescue of such persons.

IV.

The trial court erred in finding that the death o Earl Brashear was proximately caused *his* his ow fault and intentional act, and in finding that sai Earl Brashear intentionally jumped [231] ove board. The District Court further erred in findin that petitioner did not have full knowledge of th condition of said Earl Brashear or the extent, ser ousness or dangerous character thereof, or tha there was any danger that he would jump ove board. The District Court further erred in failin to find that petitioner negligently and carelessl failed to keep said Earl Brashear in a safe place o board said dredger and in failing to find that pet tioner negligently and carelessly failed to preve the death of said Earl Brashear and negligentl and carelessly permitted said Earl Brashear t jump overboard and negligently and carelessl failed to attempt to rescue said Earl Brashear.

V.

The District Court further erred in finding sa dredger in all respects seaworthy and proper manned, equipped and supplied and that petitione used due care and diligence to make said dredg in all respects seaworthy. The District Court fu ther erred in finding that the death of said Ea Brashear was due to his own wilful and intentiona

at, and said petitioner is not in any way accountable therefor.

VI.

The District Court further erred in failing to make any finding in regard to the value of the freight pending at the termination of the voyage.

VII.

The District Court further erred in finding that the death of said Earl Brashear was occasioned and occurred entirely without fault or privity or knowledge on the part of petitioner, or without any fault or negligence on the part of any of its [232] agents, servants or employees and was not the proximate result of any negligence of petitioner. On the contrary, the District Court erred in not finding that the death of Earl Brashear was due entirely to the negligence of petitioner and those in privity with it.

VIII.

The District Court further erred in making a conclusion of law that the death of Earl Brashear was not due to any negligence or fault on the part of petitioner and did not occur with the privity or knowledge of petitioner. The District Court further erred in not finding that the death of said Earl Brashear was due to the negligence and with the privity of and knowledge of petitioner.

IX.

The District Court erred in making a conclusion of law that petitioner is forever exempted from

liability for any and all loss or damage arising fro
or growing out of the death of said Earl Brashea

X.

The District Court erred in finding that petitione
is entitled to an injunction perpetually enjoinin
claimant from prosecuting her actions against peti
tioner, and from instituting, maintaining or prose
cuting any actions or proceedings against peti
tioner, except an appeal from any decree rendere
in the above entitled cause.

XI.

The District Court erred in finding the value o
the dredger to be not over $9500.00 and in not find
ing that the value of said dredger was $12,500.00 o
more.

XII.

The District Court erred in not allowing claiman
to [233] recover costs.

XIII.

The District Court erred in not finding for clain
ant and against petitioner for the amount of th
claim with interest and costs.

XIV.

The District Court erred in failing to make a
the amendments proposed by claimant to petitio
er's proposed findings of fact and conclusions o
law.

Wherefore, Hazel Brashear, claimant and appellant, prays that said final decree be reversed and that such other decrees and orders as may be just and proper in the premises be made herein.

Dated: San Francisco, California, August 22, 1938.

HONE & HONE
DERBY, SHARP, QUINBY & TWEEDT
Proctors for Claimants and Appellants

[Endorsed]: Filed Aug. 22, 1938. [234]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL.

Know All Men by These Presnts:

That Fireman's Fund Indemnity Company, a corporation, authorized to do, and doing, a general surety business in the State of California, as surety, is held and firmly bound unto Union Dredging Company, a corporation, petitioner in the above entitled cause, in the sum of Two Hundred Fifty ($250.00) Dollars, to be paid to said Union Dredging Company, for the payment of which well and truly to be made it does hereby bind itself firmly by these presents.

Whereas, Hazel Brashear, claimant in the above entitled [235] action, has appealed to the United

States Circuit Court of Appeals for the Ninth Ci
cuit, from a final decree of the United States Di
trict Court for the Northern District of Californi
Southern Division, bearing date of May 29, 1938, i
a cause wherein Union Dredging Company, a co
poration, is petitioner, and Hazel Brashear is clain
ant,

Now, therefore, the condition of this obligation i
such that if said appellant, Hazel Brashear sha
prosecute said appeal to effect and pay all cost
which may be awarded against her as such appellan
if the appeal is not sustained, then this obligatio
shall be void, otherwise the same shall be and remai
in full force and effect.

[Seal] FIREMAN'S FUND INDEMNITY
COMPANY, a corporation,
By F. H. BUTCHER,
Its Attorney-in-Fact.

(Acknowledgment). [236]

Approved as to form, as provided in Rule 22.

.....,

.....,

Proctors for Petitioner.

Approved this 22nd day of August, 1938.

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed Aug. 22, 1938. [237]

[Title of District Court and Cause.]

NOTICE OF FILING APPEAL BOND.

To Union Dredging Company, a corporation, petitioner herein, and to Redman, Alexander & Bacon and James Wallace, its proctors, to the Clerk of the above entitled court and to all others concerned:

You and each of you will please take notice and you are hereby notified that Hazel Brashear, claimant herein has on the 22nd day of August, 1938, filed her appeal bond herein.

You are further notified that the name of the surety on said bond is Fireman's Fund Indemnity Company, whose principal place of business is San Francisco.

HONE AND HONE,
DERBY, SHARP, QUINBY & TWEEDT,

San Francisco, California, August 22, 1938.

(Admission of Service).

[Endorsed]: Filed Aug. 23, 1938. [238]

[Title of District Court and Cause.]

AMENDED PRAECIPE FOR APOSTLES ON APPEAL

To the Clerk of the above entitled Court:

Please prepare transcript of record in this case on appeal to the United States Circuit Court of

Appeals for the Ninth Circuit, and include in said transcript the following:

A. Statement required by Admiralty Rule 3, Section 1, subdivision (a) and (b) of said Circuit Court of Appeals, Ninth Circuit.

B. The following pleadings together with exhibits annexed thereto:

1. Petition of Union Dredging Company for limitation of liability.
2. Ad interim stipulation.
3. Answer of claimant, Hazel Brashear.
4. Exceptions to Answer and court order concerning same.
5. Claim of claimant, Hazel Brashear.
6. Exceptions to claim and court order concerning same.
7. Order of reference to Commissioner.
8. Report of Commissioner.
9. Stipulation of value.
10. Order of court on exceptions to Commissioner's report.
11. Petitioner's proposed findings of fact and conclusions of law.
12. Claimant's proposed amendments and objections to proposed findings of fact and conclusions of law.
13. Findings of fact and conclusions of law.
14. Final decree.

C. All testimony, exhibits and depositions taken in said cause, namely, transcript of testimony and

roceedings before the Commissioner and before the Court.

D. Court minutes and proceedings and orders in bove cause namely,

1. Court minutes (trial).
2. Opinion of court directing decree for petitioner. [239]

E. Papers in connection with appeal.

1. Notice of appeal, petition for allowance of appeal and order allowing same.
2. Assignment of errors.
3. Appeal bond and notice of filing appeal bond.
4. This amended praecipe.
5. Citation on appeal.

In the preparation of said apostles you are requested to omit all captions (except name and paper) acceptance of service, verification and filing ndorsements, excepting date thereof, except that he full caption shall be placed on the copy of the etition.

Dated: San Francisco, California, August 25, 938.

HONE & HONE
DERBY, SHARP, QUINBY & TWEEDT
Proctors for Claimant and Appellant

It is hereby stipulated by and between the parties hereto, that the foregoing pleadings, opinions,

orders, and decree shall constitute the Apostles o Appeal, and that any pleadings, orders, bonds notices of filing bonds, process, notices, motions papers, documents and captions not above specifie may be omitted from the Apostles on Appeal.

August 25, 1938.

HONE & HONE
DERBY, SHARP, QUINBY & TWEEDT
Proctors for Claimant and Appellan

REDMAN, ALEXANDER & BACON
J. M. WALLACE
Proctors for Petitione

[Endorsed]: Filed Aug. 26, 1938. [240]

[Title of District Court.]

CERTIFICATE OF CLERK TO TRANSCRIP OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the United State District Court, for the Northern District of Cal fornia, do hereby certify that the foregoing 24 pages, numbered from 1 to 241, inclusive, contain full, true, and correct transcript of the records an proceedings in the Matter of the Petition of Unio Dredging Company, a corporation, etc. No. 22399-I as the same now remain on file and of record in m office.

I further certify that the cost of preparing and ertifying the foregoing transcript of record on ppeal is the sum of $34.25 and that the said amount as been paid to me by the Attorneys for the appel-nt herein.

In witness whereof, I have hereunto set my hand nd affixed the seal of said District Court, this 16th ay of September, A. D. 1938.

[Seal] WALTER B. MALING,
Clerk.

J. P. WELSH,
Deputy Clerk. [241]

Title of District Court and Cause.]

CITATION ON APPEAL

nited States of America—ss.

The President of the United States of America

o Union Dredging Company, a corporation, former owner of the dredger Carson, her machinery, tackle, apparel, furniture and appurtenances, Greeting:

You are hereby cited and admonished to be and ppear at a United States Circuit Court of Appeals r the Ninth Circuit, to be holden at the City of an Francisco, in the State of California, within irty days from the date hereof, pursuant to an rder allowing an appeal, of record in the Clerk's ffice of the United States District Court for the orthern District of California wherein Hazel

Brashear on behalf of herself personally and on behalf of claimants Richard Brashear and Gloria Brashear, and as administratrix of the estate of Earl Brashear, deceased is appellant, and you are appellee, to show cause, if any there be, why the decree or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Michael J. Roche, United States District Judge for the Northern District of California this 22 day of August, A. D. 1938.

[Seal] MICHAEL J. ROCHE
United States District Judge

Due service and receipt of a copy of the within citation is hereby admitted this 23 day of August, 1938.

REDMAN, ALEXANDER & BACON
JAMES M. WALLACE
Proctors for Petitioner

[Endorsed]: Filed Aug. 23, 1938. [242]

[Endorsed]: No. 8982. United States Circuit ourt of Appeals for the Ninth Circuit. Hazel rashear, as administratrix of the estate of Earl rashear, deceased, and on behalf of herself per- nally and on behalf of Richard Brashear and loria Brashear, her minor children, Appellant, vs. nion Dredging Company, a corporation, Former wner of the Dredger "Carson", Her Machinery, ackle, Apparel, Furniture and Appurtenances, ppellee. Apostles on Appeal. Upon Appeal from ie District Court of the United States for the orthern District of California, Southern Division.

Filed September 20, 1938.

PAUL P. O'BRIEN,

lerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 8982

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HAZEL BRASHEAR, as administratrix of the estate of Earl Brashear, deceased, and on behalf of herself personally and on behalf of Richard Brashear and Gloria Brashear (her minor children),

Appellant,

vs.

UNION DREDGING COMPANY (a corporation), former owner of the Dredger "Carson", her machinery, tackle, apparel, furniture, and appurtenances,

Appellee.

BRIEF FOR APPELLANT.

HONE & HONE,
Russ Building, San Francisco,
DERBY, SHARP, QUINBY & TWEEDT,
S. HASKET DERBY,
JOSEPH C. SHARP,
Merchants Exchange Building, San Francisco,
Proctors for Appellant.

CHARLES L. HEMMINGS,
Merchants Exchange Building, San Francisco,
DONALD LOBREE,
Russ Building, San Francisco,
Of Counsel.

Subject Index

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No. 8982

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HAZEL BRASHEAR, as administratrix of the estate of Earl Brashear, deceased, and on behalf of herself personally and on behalf of Richard Brashear and Gloria Brashear (her minor children),

Appellant,

vs.

UNION DREDGING COMPANY (a corporation), former owner of the Dredger "Carson", her machinery, tackle, apparel, furniture, and appurtenances,

Appellee.

BRIEF FOR APPELLANT.

A. STATEMENT OF PLEADINGS AND FACTS SHOWING JURISDICTION.

The final decree appealed from herein was entered in a proceeding on the admiralty side of the United States District Court for the Northern District of California, Southern Division. The proceedings were had on a petition for limitation of liability filed by the Union Dredging Co., a corporation, appellee herein, as former owner of the dredger Carson, her machinery, tackle, apparel, furniture and appurtenances (Apostles, p. 2).

The petition was filed under the Limitation Act, 28 U.S. Code, sec. 183, and this court has jurisdiction over the appeal under the Judicial Code, 28 U.S. Code, sec. 225.

In the limitation proceeding, Hazel Brashear, as administratrix of the estate of Earl Brashear, deceased, filed a claim (A., p. 105) based on the death of her husband while employed as a fireman on board the dredger Carson, which was the subject of the limitation proceeding. The claim is based on the negligence of the vessel owner in not taking proper care of the deceased while he was sick and temporarily out of his mind, and in not having a life boat on board the vessel available to save him when he jumped overboard when out of his head.

B. STATEMENT OF CASE AND THE FACTS FOUND BY THE TRIAL COURT.

a. The proceedings.

Originally, appellant filed an action at law in the Superior Court of the State of California for $45,000, claiming that her husband's death was due to the negligence of appellee herein.

Later, the appellee Union Dredging Company filed a petition in the District Court for limitation of and exemption from liability. Appellant filed claim in the limitation proceeding. A trial was had. The court filed no opinion but made findings (A., pp. 135-143) and entered a final decree in favor of petitioner. Whereupon this appeal was taken from the final decree.

The facts as found by the District Court.

Both sides offered witnesses and in general there was no conflict of testimony. The principal controversy was as to whether or not the facts developed constituted negligence on the part of appellee. The court found there was no such negligence. However, as will be discussed under a special heading, an appeal in admiralty is a trial de novo. As on this appeal we are relying on facts developed which are not in conflict, the conclusion of the trial court that there was no negligence is a mixed question of law and fact which is not controlling or even persuasive on the appellate court.

The following facts appear without dispute and were *expressly found to be true by the trial court.*

On or about May 17, 1934, the dredger Carson was afloat on the navigable waters of San Francisco Bay (Finding III, Apostles, p. 135). At said time, Earl Brashear was employed by appellee as a fireman on board the Carson (Finding IV, A., p. 137). While employed on board said vessel, Earl Brashear jumped overboard from said dredger and was drowned. In this connection the court found that "at the time said Earl Brashear went overboard he was ill. For some hours prior thereto he had been raving off and on, and off and on was out of his mind. The master, Dan Forsyth, knew of his condition but did not think any steps necessary to prevent him jumping overboard" (Finding IV, A., p. 138).

At the time Earl Brashear went overboard the dredger was moored opposite Hamilton Field. There were hospitals nearby to which Brashear could have been taken.

There was a launch alongside the dredger which could have been used to send him ashore (Finding IV, A., p. 138). In this connection, the captain testified that they could not use the launch to send him ashore as they wanted to use it to send for fresh water for the boilers (A., p. 277). The court also found that "at the time Earl Brashear went overboard, there was no lifeboat or any other boat which could have been used in an attempt to save his life" (Finding III, A., p. 136). The court also found that the only row boat aboard the dredge had been smashed on May 15, 1934, and that materials had been procured to repair said boat. But (according to the uncontradicted testimony) no other life boat was procured until *after* Brashear was drowned.

The testimony also showed without contradiction that two members of the crew would have used the boat to rescue Brashear had the boat been usable. One of the men who so testified had a life saving certificate and was familiar with what to do under the circumstances there presented (A., pp. 175-6).

C. THE ASSIGNMENT OF ERRORS AND GROUNDS URGED FOR REVERSAL.

As already indicated, there was practically no dispute as o the facts and the specific findings made by the court vere in general favorable to claimant, although ultimate inding of negligence was in favor of appellee.

This is a trial de novo and the court is not bound by the onclusion that there was no negligence and on the admitted facts, the court was clearly in error in failing to ind Brashear's death was due to the negligence of appellee. In general, we shall argue as follows:

The trial court erred in not finding a breach of the vessel owner's duty to care for a member of the crew.

1. Brashear was not properly watched, but carelessly permitted to jump overboard, although there was a legal duty to guard a member of the crew in obvious distress, and in danger of self-destruction.

2. No attempt was made to send him to a hospital, although this could have been done, and the law requires it.

3. No usable lifeboat was provided with which to rescue him, although such protection is required by the general law to protect the lives of seamen.

The assignments of error are set out in full in the appendix. They specify objections to the court finding for appellee, and to the court's failure to find there was negligence in failing to guard Brashear and in not having an effective life boat. Objection is also made to the failure to find fault and privity on the part of the dredge owner.

I. THIS IS AN ADMIRALTY APPEAL AND CONSTITUTES A TRIAL DE NOVO. THIS COURT IS FREE TO MAKE ITS OWN CONCLUSIONS, PARTICULARLY AS APPELLANT DOES NOT DISPUTE SPECIFIC FINDINGS OF FACT ON QUESTIONS OF LIABILITY, BUT ONLY GENERAL CONCLUSIONS DRAWN THEREFROM BY THE TRIAL COURT.

It is well settled that an appeal in admiralty is a trial de novo, subjecting both the facts and the law to review. The rule is discussed in many cases, such as

The Ernest H. Meyer, 84 F. (2d) 496, 498, 499 (9th C.C.A.);

Duche & Sons v. Schooner "John Twohy", 255 U.S. 77, 79, 65 L. Ed. 511, 515;

Langnes v. Green, 282 U.S. 531, 75 L. Ed. 520, 523;

The San Rafael, 141 Fed. 270, 275 (9th C.C.A.);

Nelson v. White, 83 Fed. 215, 217 (9th C.C.A.).

In stating the rule, we recognize that it has often been stated that decisions of trial courts upon questions of fact based on conflicting testimony or credibility of witnesses, are entitled to great respect. These cases have been criticized by *Hughes on Admiralty* (2d Edition), pp. 419, 420, as follows:

> "If the trial judge could decide cases at their close as juries render verdicts, there would be more force in the idea. But in districts of crowded dockets, where numerous cases, each with numerous witnesses, are tried in rapid succession, and then taken under advisement for months, nothing short of a moving picture screen, with a photographic-phonographic attachment, could bring it back to the judicial mind. To give this amiable fiction the scope which it has often been given is in effect to deny an appeal on questions of fact, which the statutes are supposed to give. That seeing the witnesses is an advantage cannot be denied. But

its importance has been grossly exaggerated. Surely the combined intelligence of the three appellate judges as against the one trial judge ought to over-balance it."

n any event the appellate court can and very frequently oes set aside the findings of fact of the trial court where here is a decided preponderance of evidence against such ndings or a clear mistake is shown:

The Fin MacCool, 147 Fed. 123 (2d C.C.A.);
The Kalfarli, 277 Fed. 391, 397 (2d C.C.A.);
The Mason, 249 Fed. 718 (2d C.C.A.);
The Medea, 179 Fed. 781, 794 (9th C.C.A.);
North American Dredging Co. v. Pacific Mail SS. Co., 185 Fed. 698, 703 (9th C.C.A.).

In the case at bar there are two sorts of findings—general findings and specific findings. The general ones set forth the conclusion of the court that there was no negligence shown on the part of appellee. The specific findings have to do strictly with various facts.

On this appeal we do not dispute any of the specific findings of the court below on the question of liability but only the general conclusion that there was no negligence.

So far as the court makes specific findings we are relying on them and not disputing them. However, so far as is concerned the general conclusion that there was no negligence below, the finding of the court below is entitled to no presumption of correctness, even under the cases which have limited the doctrine of a trial de novo on appeal.

This rule finds illustration in the case of

Johnson v. Kosmos Portland Cement Co., 64 F.(2d) 193 (6th C.C.A.) (certiorari denied).

That was a libel to secure damages for the death of a seaman employed on board a barge. The court of appeals said (p. 194):

> "The question therefore presented, upon which decision must rest, is whether the negligence of the respondent was a proximate cause of the death * * *".

The court goes on to state the rule that while an appeal in admiralty is a trial de novo, the findings of the District Court will be accepted unless clearly against the preponderance of evidence. However, says the court (p. 195):

> "Where, as here, the finding is of an ultimate fact, and the law applied reposes in the mind of the court, it must be clear that the finding is at least a mixed finding of law and fact, as to which no presumption of correctness obtains."

Here the question decided by the trial court was that appellee's conduct was not negligent. That finding is one of mixed law and fact. Therefore, the appellate court is not bound by that finding. All the facts are open to review by this court on appeal. The trial Judge's finding that there was no negligence is entitled to no weight whatsoever, particularly as no opinion was filed.

All of the witnesses who testified substantiated each other on material matters. The story is in the record. If the facts established by the record show negligence, the final decree must be reversed.

In the case at bar, we rely upon undisputed facts to establish the liability of the dredge-owner.

There is no conflict in the testimony as to any of these facts nor is there any finding by the court opposed to these

facts. Notwithstanding the establishment of these facts, the court concluded there was no negligence. On this appeal, we submit this court is free to draw its own conclusion that the facts do show negligence and that appellee is liable therefor.

The facts relied on by us are the following:

1. The master of the dredge knew of Brashear's condition, but notwithstanding did not guard him so as to prevent him from doing harm to himself.

2. The dredge was anchored where there were many hospitals nearby. The master was under a duty to send Brashear in his helpless condition to one of these hospitals. He had a launch by which he could do so, but refused because he preferred to send the launch for water for the boilers of the dredge rather than put Brashear in a place where his life could be protected.

3. The dredge had no effective lifeboat on board although the master was authorized to purchase such a lifeboat and had ample opportunity to do so before Brashear's death, but none was secured until after his death.

In arguing to this court that this is a trial de novo, we are not asking the court to overrule any specific finding

nor to accept a different point of view nor resolve a conflict between witnesses or conflicting testimony, but merely to find a conclusion different from that of the trial court on facts which are not disputed nor specifically found to be true by the trial court. We ask that the trial judge's decision of a mixed question of law and fact be reversed on appeal.

II. THE FACTS OF THIS CASE SHOW WITHOUT CONTRADICTION THAT APPELLEE DID NOT GIVE DECEASED THE PROTECTION TO WHICH HE WAS ENTITLED UNDER THE LAW, AS A MEMBER OF THE CREW.

Assignment of errors.

As the assignment of errors to which the argument under this heading is addressed and upon which appellant relies are more than two printed pages in length, we have in accord with Rule 24(d) set them out in full in an appendix to this brief. However for the convenience of the court, we summarize them here as follows:

First there are general assignments of error (Apostles, pp. 295-298) objecting to the action of the trial court "in finding for petitioner and against claimant herein" and in general finding that petitioner's conduct was without negli-

gence (Assignments I, II, V, VII, VIII, and XIII, are set out in full in the appendix hereto). Then objection is made more specifically to the action of the district court "in finding that at no time did petitioner negligently fail to supply suitable life boat * * * to be used for the rescue of any person falling overboard" (Assignment III) and "in failing to find that said dredge was not supplied with a suitable life boat" (see Appendix, Apostles pp. 295-6). Furthermore in Assignment IV (see Appendix hereto or Apostles p. 296), we object to the court's finding that Brashear's death was caused by "his own fault and intentional act" and that petitioner did not know the full seriousness of his condition. The same assignment objects to the failure to find that "petitioner negligently * * * failed to keep said Earl Brashear in a safe place * * * and permitted said Brashear to jump overboard * * * and failed to attempt to rescue him."

The facts show three-fold negligence on the part of the dredge owner.

We shall discuss the facts of the case with the pertinent law under the following headings:

1. Brashear was not properly watched, but carelessly permitted to jump overboard, although there

was a legal duty to guard a member of the crew in obvious distress and in danger of self-destruction.

2. No attempt was made to send him to a hospital, although this could have been done, and the law requires it.

3. No usable lifeboat was provided, with which to rescue him, although such protection is required by the general law to protect the lives of seamen.

At this time we shall give a chronological statement of the entire factual situation, supported by references to the record, and later discuss the law.

The deceased, Earl Brashear, was employed as a fireman on board the dredger *Carson* in the month of May, 1934, while it was afloat on San Francisco Bay, opposite Hamilton Field, engaged in deepening a channel to provide readier access to Hamilton Field.

About 7 P. M. Brashear complained of being sick. He sent for Fancort, a fellow member of the crew, who found him in bed, in distress. Fancort gave him some aspirin and left him lying in bed (A. p. 189).

About midnight, Vogel (another member of the crew) and Fancort saw Brashear on the launch tied at the stern

f the dredge. He was leaning over, talking to some maginary person (A. p. 190). Fancort called Brashear, ut Brashear made no rational response (A. p. 204). Brahear would not come off the launch and did not answer ancort. So Vogel held the launch while Fancort comelled Brashear to come on the dredge with him (A. pp. 56, 265-8). Fancort took Brashear into the fire room of he dredge. (A., p. 204). He evidently was afraid that Brashear was going to jump overboard and asked Vogel to stay with him to guard Brashear. From midnight until almost 5 o'clock, Brashear went through a series of alternate periods of frenzy and quiet. In the periods of frenzy, he would foam at the mouth, rave, climb under machinery, run around and act like a man possessed (A., pp. 190, 173-4). He talked "about somebody putting fish hooks into his baby's eyes" and wedged himself under a bench so that he was stuck and could not get out (A., p. 190). Vogel stayed about 15 minutes (A., p. 257) and when Vogel left to go to bed about 1 A. M. (A., p. 257) Fancort had another fireman named Pedersen get out of bed to come down. (A., pp. 173, 190). He corroborates the testimony as to the alternate periods of frenzy and quiet. He was "out of his head there off and on"—"just running around" (A., p. 174). On coming down he found Fancort sitting on top of Brashear in order to restrain him. Brashear was foaming at the mouth and out of his head (A., pp. 173-4). At 3 o'clock, Fancort evidently became desperate and went up to ask Captain Forsyth what to do (A., p. 174). He told Forsyth that Brashear was in "bad shape", that he was "pretty bad", but "maybe he could take care of him" (A., p. 278).

The captain discussed the propriety of tying the man up (A., pp. 215, 279-280) and discussed the question of sending Brashear ashore in the launch to a hospital. (A., p. 191). There was a launch there available for this purpose (A., pp. 174, 191). However, it developed that he thought they needed the launch to go after water for the boilers on the dredge, and the captain told Fancort to wait until after the launch was used to get the water (A., p. 174). Thereafter they intended to take Brashear to a hospital (A., pp. 208-9).

Captain Forsyth, who was in charge of the dredge, testified that he did not want to send the launch to Hamilton Field at that time because it was low tide, but, in view of his testimony that there was no hospital at Hamilton Field (A., p. 276), it is obvious that the real explanation is that he was more interested in getting the water for his dredge than seeing that Brashear was given the medical attention necessary for a man in his condition. First aid would have been useless. Forsyth admitted that what prevented him from using the launch to send Brashear ashore was that he preferred to use the launch to get water (A., p. 277).

Forsyth knew that Brashear had to be restrained because he told Fancort that in a similar case previous, they were compelled to tie the man up to prevent his harming himself (A., pp. 279, 280).

Fancort returned to the engine room, where he and Pedersen continued to watch Brashear. There were further alternate periods of frenzied ravings and periods of quiet. Things got so bad that about 4:30 A. M. Fancort again went to see Forsyth as to what could be done (A., p.

86). They again discussed the propriety of tying up Brashear or sending him to the hospital. It was again decided not to send Brashear ashore until after water was obtained for the dredge (A., p. 174) and, obviously, if the launch was to be sent for water, they could not take care of Brashear, as there were no facilities at McNear's Point to take care of such a case, and it was to McNear's Point they had to go for water (A., pp. 277, 287).

Fancort finally left Forsyth, with the assurance that he thought Pedersen and he could hold Brashear until the Captain was ready to send him ashore (A., p. 278).

When Fancort returned to the engine room, Brashear was having one of his quiet intervals. Fancort then went up to get a cup of coffee (A., p. 207). While he was on his way for the coffee, Brashear was left alone with Pedersen. The latter was apparently getting sleepy, as it was then 4:30 A. M. (A., p. 182) or 5 A. M. (A., p. 286) and Pedersen had been called out of bed at 1 A. M. (A., p. 173). Brashear rose hurriedly and dashed through the door and into the water before Pedersen could stop him (A., p. 175). Brashear was out of his head, but obviously trying to drown himself. He refused to go after a plank that was thrown into the water after him (A., pp. 185, 211). Pedersen was an expert life saver, with a life boatman's certificate from the United States Government (A., p. 175) and both he (A., pp. 176-7) and Fancort (A., p. 214) testified they would have gone out to save Brashear had any boat been available. The only boat available had been broken two days before (Finding III, A., p. 136) so that nothing could be done except to stand and watch the man drown.

Just before Brashear went overboard, the launch had gone on its way to McNear's Point for water (A., p. 178). Fancort blew the whistle for the launch to come back (A., p. 191) but by the time the launch got back, it was too late to do anything except grapple for the body (A., p. 212).

With respect to the broken boat: the trial court found it was broken on Tuesday, May 15, 1934 (A., p. 136). On the Wednesday before the drowning, which happened Thursday, the captain had sent the launch ashore to get some lumber with which to repair the boat (A., pp. 271-2), but the repairs had not been made, though they were in the course of being made (A., pp. 184, 203). He could have used the launch to send for material or another life boat (A., p. 283). He should have got another boat at the same time he got the lumber, but didn't think to get this other boat until Brashear was drowned. Brashear drowned Thursday morning May 17, 1934 (A., 137). Then Haas, the president of appellee corporation, brought another boat which was left on the dredge while the broken one was being repaired, but this was after Brashear had drowned (A., p. 272).

The presence of a life preserver on board is disputed (A., p. 177). If there was one, it was at the far end of the dredge and was never thrown out to Brashear. The court found that there was a life preserver on board.

A mere statement of the above facts, without any citation of authorities, should be sufficient to indicate the callous attitude of appellee with respect to life saving equipment on board the dredger. Mr. Haas, as the managing owner, testified that he did not have enough interest in the life

aving equipment to ascertain whether there was any on oard the Carson or to delegate to anyone the job of get-ing it (A., pp. 158-9). True, Mr. Haas did provide an-ther boat to be available while the broken one was being epaired, but not until after Brashear was drowned. For-yth testified that he had full authority to buy whatever vas necessary for the dredge (A., p. 282) and could have btained a life boat (A., p. 283). Forsyth could have just s easily provided for another boat as to get the lumber o repair the broken boat. Haas testified that Forsyth vas in full charge and was the equivalent of appellee's 'marine superintendent'' (A., pp. 151-2, 168-9).

Under an appropriate heading, the court will be referred to decisions showing the heavy responsibility upon a vessel in cases like the one under discussion. A ship at sea is required to go to the nearest port and insure the seamen proper medical attention, when the ship cannot provide it. Here the dredge Carson was in the port of San Francisco, with many hospitals available to which the unfortunate man could have been sent, but Forsyth was more interested in water for his boilers than in saving the life of one of the men under his care. It is obvious that tying and hold-ing and aspirin were temporary expedients. If Brashear had been taken directly to a hospital, he would be alive and well today.

1. **Brashear was not properly watched, but carelessly permitted to jump overboard, although there was a legal duty to guard a member of the crew in obvious distress and in danger of self destruction.**

As a matter of law this constitutes negligence. Under this heading, we shall discuss the law applicable and then refer to the facts to show that under the general law applicable, appellee failed to give Brashear the proper care to which he was entitled as a seaman.

To begin with, it is clear that there is no duty on a seaman to ask for a doctor or hospital attention. Without any request from the sick seaman, the master is under an obligation to see that the employee gets intelligent medical assistance as soon as the master learns of his illness.

The M. E. Luckenbach (D. Va.) 174 Fed. 265, 267.

There is also a clear duty on the part of the officers and crew to care for and nurse a seaman at a time when he is ill and mentally unable to care for himself. The case at bar is very similar to that of

Russell v. Merchants & Miners Transp. Co. (D. Va.), 19 F. Supp. 349.

That was an action by the administrator of the deceased to recover damages for his death, due to the failure of officers and crew of decedent's ship to care for and properly nurse him at a time when he was ill and mentally incapable of taking care of himself so that he went overboard. The court first found on meager testimony that the failure to throw him a life line or life preserver did not make any difference because the man was not in a mental condition to take advantage of any such help, if offered, and sank at once. The court did not discuss the question of the duty

of the ship to have a life boat present. This was not necessary because it found the owner liable on other grounds. The discussion on the point in respect to which the vessel was found liable is pertinent and we quote it in full.

"This brings us back to the first ground of negligence charged in the libel, viz., in substance, the alleged failure of the officers and crew to care for and properly nurse a seaman who was seriously ill (whether temporarily or not does not appear) and who was mentally and physically incapable of caring for or protecting himself against the imminent danger of falling overboard and drowning. The testimony shows that deceased was found on the pantry floor, suffering from an epileptic fit or other seizure which had rendered him unconscious. He was then taken on deck to get fresh air, and although he regained to an extent the power to stand and walk, the testimony shows with unmistakable certainty that he never regained consciousness except to a very limited extent before he fell or stepped overboard and that he was manifestly unable to care for himself and unfit to be left to his fate. While there is merit in respondent's contention that the steward and the seamen present were not medical experts and did not know how to treat the illness with which Russell was afflicted, the court would hesitate to hold that any of them was so ignorant and inexperienced as not to be able to appreciate the necessity of restraining and guarding a man in his condition until he regained mental composure and the ability to care for himself. **Allowing him to break away from them and go aft unassisted and unprotected under the circumstances was clearly negligent failure to care for and nurse an ill seaman and the sole proximate cause of his drowning.**"

It will be noted that in the *Russell* case, the deceased had had only one seizure, and yet the owner was found liable when the deceased was permitted to break away from those guarding him. In our case, the man had repeated seizures so that those in charge of the dredge were put on notice as to the necessity for taking care of him, and from the fact that he had these repeated seizures, they were put on notice that he would be likely to have another seizure which would be dangerous.

At the time of these repeated seizures, there was a launch available, in which Brashear could have been sent to any one of a number of hospitals. However, Captain Forsyth would not do this until after the launch had been sent to get water for the dredge's boilers.

Under the cases we shall cite next herein it will be pointed out that a vessel at sea is required to turn back to the nearest port in order to get proper hospital attention for a sick sailor. Here the dredge was already in port and near to many hospitals, but Captain Forsyth thought more of his boilers than of saving the life of Brashear.

In the *Russell* case the court held it was clearly negligent failure to care for and nurse an ill seaman to allow him to break away from them. The case at bar is very much more aggravated.

Brashear had so many repeated fits and did so many strange things that Fancort twice went to Forsyth to ask him what to do. Brashear was not tied up because Fancort promised on behalf of himself and Pedersen as follows: "We can hold him" (A., p. 280). "We can hold him until we can take him ashore" (A., p. 278). In spite of Fan-

cort's promise to the captain that they would hold him, Fancort left him alone with Pedersen. This was extremely dangerous and entirely unwarranted in the light of the facts that showed Brashear was in a dangerous condition. It should be pointed out that Brashear was left in the charge of two men who gave up their sleep and watched him without relief until they became so tired and sleepy that they could watch no longer.

Just what protection did Brashear have at the time he went to his death?

Captain Forsyth was in his bunk, too indifferent or too tired to get up. Fancort went away to get a cup of coffee to keep him awake. Pedersen was left alone and too sleepy to guard Brashear properly. Pedersen had been called out of his bed at one o'clock (A., p. 173) and Fancort would have gone to bed had he been able to (A., p. 206).

In the court below the appellee produced no evidence to controvert the above facts. The fact remains that Fancort was so afraid that Brashear would jump overboard that he got Vogel and Pedersen to help him restrain Brashear. Fancort had to take Brashear off the launch, then out from under the boilers and literally had to sit on top of Brashear to hold him down at another stage of his frenzy. Yet appellee would have the court believe that nobody anticipated any danger or trouble from Brashear! If appellee's contention is true, then all the effort to have two people watch Brashear, the argument of whether or not to tie him up, and the promise of Fancort that he and Pedersen would hold Brashear until he could be taken ashore are meaningless. Petitioner's witness Vogel broke down

on cross-examination when asked why everybody was so worried about Brashear (A., pp. 263, 267).

There can be no explanation as to Brashear's jumping overboard except that Pedersen must have gotten sleepy while Fancort went to get a cup of coffee. This was not taking proper care of a man in a dangerous condition nor fulfillment of the promise that he and Pedersen would hold Brashear until the launch went to shore. The other significant thing about the matter is that Captain Forsyth, the man in charge, was too tired and too indifferent to come down to see what was wrong. True, he gave the alibi that he was very tired from over work (A., p. 278) and true it is that Fancort had promised that he and Pedersen would hold Brashear, but his callous indifference in the hour of Brashear's need cannot be glossed over by the glittering generality that it was an inevitable accident.

We have a case of a man in charge of a dredge, knowing that one of his crew is dangerously sick, who still stays in bed, relying solely on the haphazard voluntary efforts of two tired and sleepy members of the crew to restrain the sick man. Fancort called Pedersen "on his own hook" (A., p. 278).

2. No attempt was made to send him to a hospital, although this could have been done, and the law requires it.

As a matter of law, it was the duty of the master to send Brashear to a nearby hospital. There was a launch available for this purpose, but Forsyth thought water for the boilers was more important than saving Brashear's life. In this connection the court found (A., p. 138):

"At the time said Earl Brashear went overboard he was ill. For some hours prior thereto he had been raving off and on, and off and on was out of his mind. The master, Dan Forsyth, knew of his condition, but did not think that any steps were necessary to prevent him from jumping overboard. At the time Earl Brashear went overboard the dredger Carson was anchored in the navigable waters of San Francisco Bay opposite Hamilton Field. There were hospitals in San Francisco, Richmond, Berkeley and San Rafael to which Brashear could have been taken during the night. There was a launch alongside the dredger which could have been used to send him ashore."

Failure of the captain to send Brashear ashore was thus explained by him (A., p. 277):

"Mr. Sharp. Q. What prevented you from using the launch?

A. We were sending the launch over to McNear's Point for fresh water".

The court will note that the trial court found that at this very time the launch was alongside and could have been used (Finding IV, A., p. 138).

The captain did have in mind the necessity of sending Brashear ashore to a hospital. He told Fancort to take Brashear ashore after they got the water barge back (A., p. 174). Forsyth's explanation admits that he was told that Brashear was in a bad condition but gave the explanation that Fancort thought that he and Pedersen could hold him until the launch came back from the trip for water (A., 278-9). In other words, the master thought it more important to get water for the boilers than to get Brashear ashore and save his life.

This callous indifference to the safety of a helpless seaman is contrary to all the obligations placed on the master.

This court is doubtless familiar with the duty of a vessel, even at sea, to turn back to take a man to a hospital. As said in *The Iroquois,* cited by appellee in the court below, 194 U. S. 240; 48 L. Ed. 955:

> "If the accident happens within a reasonable distance of such port, his duty to do so would be manifest * * * The master was his legal guardian in the sense that it is a part of his duty to look out for the safety and care of his seamen, whether they make a distinct request for it or not" (194 U. S. 242, 247; 48 L. Ed. 958, 959).

Other cases to the same effect could be multiplied, but we refer here to only a few.

Harris v. Pennsylvania RR. Co. (4th C.C.A.) 50 F. (2d) 866, 868;

Anelich v. The Arizona (1935) 49 P. (2d) 3, 183 Wash. 467, 1935 A.M.C. 1332 (affirmed 298 U.S. 110 without reference to this point);

Whitney v. Olson (9th C.C.A.) 108 Fed. 292;

The C. S. Holmes (9th C.C.A.) 237 Fed. 785, 787;

The cited cases show that the courts should and do look into the availability of hospitals. The master must do everything within his power to take a sick or injured seaman to a place where hospital or medical attention is available. The excuse that the launch was needed to go for water will not stand against the authorities cited above.

3. **No usable lifeboat was provided with which to rescue him, although such protection is required by the general law to protect the lives of seamen.**

As a matter of law it was appellee's duty to have an effective lifeboat on board. In this connection, we quote the court's finding (A., p. 136):

> "A small flat-bottomed rowboat was a part of the equipment of the Carson when she went on the voyage in question; the rowboat had been smashed on Tuesday, May 15, 1934, in an accident and had not been repaired at the time Earl Brashear went overboard, but materials had been procured from the shore for the repair of the boat, and the boat was in the process of being repaired. At the time Brashear went overboard, there was no lifeboat or any other boat which could have been used in an attempt to save his life."

We have already reviewed the testimony in support of this finding and particularly the testimony that although the master sent ashore to get materials to repair the broken boat, he did not secure a substitute life boat to keep on board until after Brashear was drowned. We have also pointed out that there were men on board experienced and capable of effecting the rescue had there been such a boat. The absence of such a life boat on board the dredger as a matter of law made appellee responsible for the death of Brashear. There are many cases which may be cited in this connection, including the following:

Harris v. Pennsylvania Railroad (4th C.C.A.) 50 F. (2d) 866, 867-8, 869;

Cortes v. Baltimore Insular Line, 287 U. S. 367, 77 L. ed. 368;

The G. W. Glenn (D. Dela.), 4 F. Supp. 727, 728, 729 and 730;

Salla v. Hellman (D. Cal.) 7 F. (2d) 953, 954.

A vessel is under duty to have life saving equipment to save a seaman overboard.

> "Normally these means (of rescue) include an effective lifeboat, available life preservers, or life rings."
>
> *The G. W. Glenn,* 4 F. Supp. 727, at p. 730.

The Supreme Court has said that a ship without life preservers is unseaworthy.

> *Carlisle Packing Co. v. Sandanger* (1922) 259 U. S. 255, 259; 66 L. ed. 927, 930.

It should also be pointed out that the duty toward a seaman to keep the ship seaworthy is one which is not discharged by simply commencing the voyage in a seaworthy condition, but that the duty is a continuing one.

> *Carlisle Packing Co. v. Sandanger,* cited above.

A vessel owner is liable for the unseaworthiness of a ship or for the failure to keep in order the proper appliances appurtenant to the ship.

> *The Osceola,* 189 U. S. 158, 171, 175, 47 L. ed. 760, 763, 764
>
> 56 *C. J.* 1087-8.

Very pertinent in this connection is *The G. W. Glenn,* cited above. That was also an action under the Jones Act. The following quotation from that case is so pertinent that it requires no further comment (4 F. Supp. 727, at pp. 728, 729, and 730):

> "The only life-saving equipment provided by the owner was a lifeboat. As is customary, the lifeboat of the Glenn was suspended from davits overhanging her stern. At the time of the accident it was lashed to a

davit so that the stern of the boat could not be lowered into the water. * * *

* * * After keeping afloat for three minutes or longer he sank, and his body was recovered some weeks later. When asked whether there was not some one aboard who had the heart to get out after the boy, another seaman testified, 'They had nothing to get after him with.' "

Like the claimants' claim in the case at bar:

"The libel charges that the death of Phillips resulted from an injury due to 'negligence on the part of the respondents, their agents, servants and/or employees' in providing a lifeboat that was defective, improperly carried, and not supplied with adequate oars; in not providing life preservers; * * *
* * * * * * *

The duty to rescue a seaman overboard is a duty of the ship and of the owner under the general maritime law of the sea. 'There is little doubt that rescue is a duty when a sailor falls into the sea.' * * * 'Equally clear is the obligation upon the part of the ship to save the life of a sailor who falls overboard through a misadventure, not uncommon in his dangerous calling. It is absurd to admit the duty to extend aid in the lesser emergency (seaman's illness), and to deny it in the greater. *In both cases, it is implied in the contract that the ship shall use every reasonable means to save the life of a human being who has no other source of help.* The universal custom of the sea demands as much wherever human life is in danger. The seaman's contract of employment requires it as a matter of right.' * * * 'There appears to be recognized a further duty on the part of a ship to its sailors, to make all reasonable efforts to rescue them if they fall overboard from any cause what-

soever. And it would appear that this is a not improper extension of the ship's duty. The very nature of the employment is one subjecting the sailor to grave risk of just such peril, and his helplessness and the master's ability to protect him, is manifest.' Bohlen's Studies in the Law of Torts, 312. Mr. Justice Field, charging a jury in a manslaughter case back in 1864, said: 'Now, in the case of a person falling overboard from a ship at sea, whether a passenger or seaman, when he is not killed by the fall, there is no question as to the duty of the commander. He is bound, both by law and by contract, to do everything consistent with the safety of the ship and of the passengers and crew, necessary to rescue the person overboard, and for that purpose to stop the vessel, lower the boats, and throw to him such buoys or other articles which can be readily obtained, that may serve to support him in the water until he is reached by the boats and saved. No matter what delay in the voyage may be occasioned, or what expense to the owners may be incurred, nothing will excuse the commander for any omission to take these steps to save the person overboard, provided they can be taken with a due regard to the safety of the ship and others remaining on board. Subject to this condition, every person at sea, whether passenger or seaman, has a right to all reasonable efforts of the commander of the vessel for his rescue, in case he should by accident fall or be thrown overboard.' United States v. Knowles, 26 Fed. Cas. 800, 802, No. 15,540."

Particularly applicable to this case is the following language:

"The duty of the ship and owner to rescue a seaman overboard *necessarily implies the duty to provide the means of rescue.* Normally these means include an

effective lifeboat, available life preservers, or life rings. Applying this law to the facts, I find that the owner of the Glenn violated the provision of the Jones Act recited above by neglecting to provide proper means to discharge the duty to rescue Phillips."

Another leading case is the *Harris* case, above cited, rom which we quote as follows (50 F. (2d) 866, 867-8, 69):

"At the close of the plaintiff's case in the trial below, the defendant made a motion for a directed verdict in its behalf, which was granted by the district judge. He held, in effect, that it was the duty of the defendant railroad Company to exercise reasonable diligence to save the deceased after it was ascertained that he was in danger of his life; but that even if it could be said that there was a lack of such diligence on the part of the mate and the fireman to do all that was reasonably possible to save the drowning man by throwing lines or buoys into the water, nevertheless there was no evidence from which the jury could reasonably conclude that more diligent action on their part would have saved their comrade's life. The judge thought that even if additional steps had been taken, it was still merely a matter of speculation as to whether the deceased would have been able to have availed himself of them so as to be saved. See New York Cen. R. Co. v. Grimstad (C.C.A.) 264 Fed. 334, where a similar decision was made.

Two main questions are presented by the argument of counsel: (1) Whether when the seaman fell overboard by reason of his own misfortune or carelessness, and without negligence on the part of any other member of the crew, the defendant owed him a duty to rescue him from his peril; and (2) if this duty be

found to exist, whether there was negligence on the part of the crew in failing to perform it."

The contention next referred to is similar to appellee's position in the present case:

"* * * The defendant contends that if a seaman falls overboard from his ship through his own neglect or misfortune, and without negligence on the part of the vessel contributing, no legal obligation exists on the part of any one on board to attempt to rescue him from his peril; from a legal standpoint, he may be left to die with impunity. No direct authority is cited for this position, but it is suggested that the relationship of a seaman to the owners of his ship is governed by the well-known rules of the law of master and servant, and cases are cited which hold that an employer, free from negligence, is not required to furnish medical care and attention to an employee who becomes ill or is injured in the course of his work (Cases cited). The authorities, however, even as to nonmaritime occupations, are not uniform, and some hold that in hazardous employments, there is a tacit understanding existing between the parties that if an employee is so injured in the course of his employment that he cannot care for himself, the employer, in the emergency will furnish him with the necessary treatment. (Cases cited).

We are referred to no decisions involving the bald question presented in the case at bar, although cases are cited in which the negligent failure of a ship's crew to save a drowning seaman has been treated as a material circumstance in determining the obligation of the vessel. * * * (Cases cited.) *But we have no doubt that a legal obligation rests upon a ship to use due diligence to save one of the crew, who, by his own*

neglect, falls into the sea; and that the owners are liable if, by failure to perform this duty, his life is lost. The reason is apparent when we consider the peculiar relationship of the seaman to his ship, which, irrespective of statute, has been recognized from the earliest period. The general rules of master and servant apply, but they are modified by the nature of the business. The contract of employment involves not merely a surrender of the personal liberty of the seaman to a greater extent than is customary, Robertson v. Baldwin, 165 U. S. 275, 17 S. Ct. 326, 41 L. Ed. 715, but it imposes upon the employer an exceptional obligation to care for the well-being of the crew.

There is no other peaceful pursuit to which the dominion of the superior is so absolute and the dependence of the subordinate so complete, as in that of a sailor upon a vessel at sea. He binds himself by the contract of employment to serve the ship during the voyage, and desertion may be made an offense punishable by imprisonment. He owes obedience while on shipboard to his superior officers, and is bound to execute their lawful commands even at the risk of danger to his person or his life; and their right to enforce obedience by proper discipline and punishment has been recognized. *If he is taken sick or is injured on board the ship, or is cast into the sea by the violence of the elements or by misfortune or negligent conduct, he is completely dependent for care and safety upon such succor as may be given by the members of the crew.* By reason of these conditions, the maritime law extends to mariners a protection greater than is afforded by the general rules of common law to those employed in service upon the land. From time immemorial, seamen have been called the 'wards of admiralty'; and in this country as elsewhere the Legislature

has enacted an elaborate system of legislation for their protection. *Regardless of legislation,* it is uniformly recognized that it is the duty of a vessel to care for a seaman who is taken sick or receives an injury on a voyage in the service of the ship, to the extent of providing medical care and attendance, and, if possible, a cure at the expense of the ship. And it is even required, where a serious accident occurs, that the master shall exercise a reasonable judgment as to putting into the nearest available port, in order that proper treatment may be secured. (Citing cases). Equally clear is the obligation upon the part of the ship to save the life of a sailor who falls overboard through a misadventure, not uncommon in his dangerous calling. It is absurd to admit the duty to extend aid in the lesser emergency, and to deny it in the greater. In both cases, it is implied in the contract that **the ship shall use every reasonable means to save the life of a human being who has no other source of help. The universal custom of the sea demands as much wherever human life is in danger. The seaman's contract of employment requires it as a matter of right.**

* * * * * * *

These obvious facts lead us to conclude that there was evidence of neglect on the part of the crew, and further that it *was for the jury to decide whether the man could have been saved if due diligence had been used.* The deceased, even when last seen, was within 200 feet of the point at which a life ring, if promptly thrown, would have rested on the surface of the water. He was evidently making every possible effort to save himself. *Whether in any event he would have succeeded is not a certainty, but in our view there was enough testimony tending to show a reasonable prob-*

ability of rescue, had a life ring or heaving line been used, to justify the submission of the question to the jury.''

It will be noted that the *Harris* case disposes of the only ase cited by appellee in the course of the argument in he trial court *New York Central R. Co. v. Grimstad* (2 C.C.A.), 264 Fed. 334. The trial court in the *Harris* case ollowed the *Grimstad* case along the same argument made y petitioner that it was purely speculative as to whether r not the man could have been saved. However, the trial ourt, in following the line of argument presented by petiioner here, was reversed. The court will note that in the *Grimstad* case the man overboard went under at once, so hat there was no hope of saving him.

In the case of *Newport News Shipbuilding & Drydock Co. v. Watson* (4th C.C.A.), 19 F. (2d) 832, it is decided hat the owner is liable for its employee's negligence in ailing to use due diligence to save a man overboard. The ourt will examine into probabilities to see what the result would be if the ship had fulfilled its duty to the drowning nan.

Under the *Glenn* case, 4 Fed. Supp. 727, the vessel's duty to have proper life saving equipment includes an effective ifeboat. Certainly petitioner cannot make any protest that t exercised due care under the circumstances when it did ot provide an effective lifeboat until after Brashear was drowned.

On this phase of the case all that appellee can say is that it is purely speculative whether Brashear could have been saved even if they had a lifeboat. This was the line of ar-

gument accepted by the court in the *Grimstad* case bu repudiated in the *Harris* case (50 F. (2d) 866), which re versed the trial court for relying on the *Grimstad* case.

In the case at bar, the testimony was undisputed tha at the time Brashear was struggling in the water, the moo was shining, and there were no waves or bad weather Brashear was close to the dredge, there was an expert lif saver on board and therefore competent to save a man lik Brashear. Had there been an effective lifeboat available there was nothing to prevent Brashear from being rescued

Fancort testified that even when he and the captai came down to the main deck after Brashear was discovere in the water, he was still within twenty feet of the dredg (A., p. 200). This was some time after he jumped over board. With all the men present to man the lifeboat, wit an expert with a government certificate in charge, the un contradicted testimony is there was nothing to prevent hi rescue were a boat available. Brashear was still out o his head and did not want to be saved, but it is of cours a matter of general knowledge that in saving a drowning man a rescuer must take into account that the drowning man will impede rather than assist the efforts on his be half, and often has to be rendered unconscious so that h may be saved. Brashear was a small man, about 62 inche high and 140 pounds in weight (A., p. 186). This woul have made his rescue simple.

Appellee's neglect and failure to use proper care is clear.

The whole burden of appellee's defense on this phase of the case in the court below is that neglect is a matter depending on all the circumstances and they did the best they could.

The simple answer is that they did not exercise reasonable or any care. They could have gotten the lifeboat before Brashear's death just as easily as they got the lumber to repair the old one. They could have sent him ashore to a hospital rather than sending the launch to get water. They could just as easily have had two men effectively guarding Brashear instead of getting a sleepy man out of bed, and then leave him alone while the other went for coffee. They could even have tied Brashear up if they were too sleepy or indifferent to stay with him the night through. We think no further comment is necessary to show that petitioner has failed to show any reasonable care under the circumstances, even on its own theory.

Their theory is that petitioner's negligence had no connection with Earl Brashear's drowning. The argument answers itself. In three separate respects petitioner's failure to perform the duties owed to Brashear led to his untimely death.

As stated in the *Russell* case, letting the victim get away was the proximate cause of his death. Failure to send Brashear to a hospital was in itself a basis for liability. In the *Glenn* case, the failure to have aboard an effective lifeboat was alone held a basis for liability.

III. THE PETITION FOR LIMITATION OF LIABILITY SHOULD BE DENIED.

Assignment of errors.

Assignments V, VI, VII, VIII, IX, X and XI pertain to the argument under this heading. Assignment V objects to the finding that the dredger was "in all respects seaworthy" (A. p. 296).

Assignment VI complains of the error "in failing to make any finding in regard to the value of the freight pending at the termination of the voyage" (A. p. 297). Assignment VII objects to "finding that the death * * * occurred entirely without fault of privity or knowledge on the part of petitioner" (A. p. 297). Assignment VII objects to the failure to find that "the death * * * was due to the negligence with the privity and knowledge of

etitioner'' (A. p. 297). Assignment IX (A. p. 297) states: The District Court erred in making a conclusion of law hat petitioner is forever exempted from liability for any and ll loss or damage arising from or growing out of the death f said Earl Brashear''. Assignment X (A. pp. 297-8) bjects to the ''finding that petitioner is entitled to an njunction perpetually enjoining claimant from prosecuting er actions against petitioner''. Assignment XI (A. p. 98) declares that ''The District Court erred in finding the alue of the dredger to be not over $9500.00 and in not inding that the value of said dredger was $12,500.00 or nore.''

All the assignments are set out in full in the Appendix ereto, and may also be found in the Apostles at pages 295 to 298.

f the court finds liability on the part of petitioner then the question of limitation of liability becomes important.

If this court finds that there was liability on the part of petitioner in the court below, then will become important he question of the right of appellee to limit liability. Appellant's claim is for $45,000. The court found the value of the dredge to be only $9500.00 (A. p. 139), and the gross proceeds of the voyage to be $1813.25. In view of

the fact that the testimony showed wages running from $100 to $200 a month, and a life expectancy of 39 years, Brashear would theoreticaly have earned in his life time a minimum of $46,800 and a maximum of $100,152.00.

Hence, if liability is established, the likelihood of obtaining an award in excess of the value of the vessel and pending freight makes the issue of limitation an important one. In this connection, appellant contends that limitation should be denied.

The record contains all the testimony necessary to make a proper award in this case. If the court wishes to do so, instead of sending the case back to the trial court, we shall be glad to file a supplementary brief referring to the testimony and to the law applicable. The widow and orphans have waited many years, and a final decree entered in this court would bring this case to a speedy conclusion.

1. Privity and knowledge on the part of petitioner has been shown.

Whatever faults were committed in this case, certainly are chargeable to Captain Forsyth. Forsyth was appellee's "marine superintendent". Although they call him captain (A. pp. 168-9) he was really a captain by courtesy

nly, as he had no papers, but he was in full charge of maintaining the dredge and keeping it in order (A., p. 52) and in charge of appellee's operations (A., p. 169). He could purchase what was necessary for the dredge without consulting anybody (A., pp. 282-3). So far as is concerned the testimony of Haas, the managing owner, it has already been pointed out that he did not have enough interest in the life saving equipment to know whether there was adequate equipment on the Carson, or delegate the duty to any one else to see that it was available (A., pp. 58-9).

The knowledge and fault of a marine superintendent similar to Captain Forsyth binds the vessel owner.

The Teddy, 226 Fed. 498;
The Erie Lighter, 250 Fed. 490.

In general, however, we may point out that the vessel's owner is not entitled to limit his liability merely by proclaiming that he did not know anything at all about the facts of the accident; it is not enough for Mr. Haas to say, as he did in this case, that he didn't know whether the dredger "Carson" had any life saving equipment. He cannot say he did not ask anyone to look into the matter, and then escape blame by relying on his ignorance. Those who refuse to see, those who shut their eyes to plain legal duty, cannot escape liability by relying on such self-assumed blindness.

Nor can a shipowner escape liability for death due to neglect by passing the blame for the neglect to employees. Mr. Haas' testimony is contradictory. If, as he testified, he turned over the responsibility of putting the ship in

order to Mr. Forsyth, Mr. Forsyth's neglect is the petitioner's neglect. And if, as he also testified, he was familiar with the condition of the dredger and her equipment through frequent visits aboard her during her voyage, how can it be said that he had no knowledge of the condition leading to Brashear's death?

In order to avail itself of the limitation statute, petitioner must show that the loss was occasioned without the privity and knowledge of such owner. Petitioner claims that Haas did not know of the facts of the accident but under the cases, it is not enough that Haas did not know of the facts of the accident, as he did know or should have known of the other things responsible for the death of Brashear.

It was Haas' duty to see that proper life saving equipment was on the dredge. He could not avoid this duty by ignoring it or supposing some one else would attend to it. If Haas relies on the delegation of this duty to Forsyth he should have proved there was such delegation, as admittedly petitioner has the burden of proof on this phase of the case.

Instead of proving such delegation Haas affirmatively testified that he neither himself took precautions to see there was life saving equipment on the dredge or caused any one else to undertake this duty (A., p. 159). There was therefore complete failure to comply with the duty in this regard. On the other hand, if Haas claims he turned over the complete responsibility of dredging operations to Forsyth, then Forsyth was the superintendent in charge whose knowledge is the knowledge of petitioner.

We shall cite cases on each of these points.

In the light of Haas' admission that he made no attempt to see whether there was any life saving equipment on board the dredge we call attention to the case of *Quinlan v. New* (1st C.C.A.) 56 Fed. 111, 117, where the court says that the privity or knowledge that will defeat limitation need not be actual but may be imputed. Extremely pertinent is the judge's statement where he finds that privity or knowledge arises

> "where the owners give an order for the doing of a particular thing in a particular way, and assume that it is done, or do not inquire whether or not it is afterwards accomplished. Under such circumstances the word 'privity' is even more pertinent than 'knowledge' because, while the conduct of the owners would in law impute knowledge they would also actively partake.
>
> *"Each is also imputed to those who refuse to see or who are guilty of perverseness, or of such crass negligence as amounts to it."*

The case of

Great Lakes Transit Corporation (6th C.C.A.) 81 F. (2d) 441, 444; 63 F. (2d) 849

is to the same effect. There the court points out (p. 444):

> "The statute does not require that knowledge be actual; it may be imputed of some one in charge for the owner had general authority to act for him and by the exercise of ordinary care could have discovered the fault * * * Captain Burke, the superintendent for Playfair was present when the door was repaired and could have known whether the repairs were sufficient to make the 'barge seaworthy'."

In the case of *In re Jacobson,* 52 F. (2d) 179, 180-181, the court quotes from

Christopher v. Grueby (1st C.C.A.) 40 F. (2d) 8,

as follows:

> *"The duty of shipowners to their seamen to see th their ship is seaworthy and her equipment in safe co dition for use when she starts on a voyage is a pe sonal one,* responsibility for which they cannot esca by delegating its performance to another. In this r spect it is like the *common-law duty of a master t provide his servant a suitable place in which to wor And a seaman injured through failure to perform th duty is entitled to compensation."*

It cannot be disputed that there is a continuing duty t keep the ship safe for the seamen employed.

The Republic (2d C.C.A.) 61 Fed. 109.

In the *Jacobson* case, the court points out that the lim tation statutes are designed to protect shipowners who, i the business of sending ships to sea, make them shipsha for the voyage. As the court says in this case:

> "* * * a boat equipped and fitted as the Edward wa was in no sense seaworthy for the voyage undertake If an owner desires to take ventures such as this on was, of course, he has a right to do so, but he has n right, when loss to persons or property occurs, t *claim the benefits of an act the purpose of which wa to encourage the building and equipping of first cla merchant ships,* adapted to and well provided for th purpose for which they are to be used."

2. Petitioner failed to surrender the freight pending on th voyage.

The petitioner seeks to limit its liability to the value o the vessel and in its sworn petition stated there was n "freight pending" (A., p. 5). The testimony develope however, that it had not only received money for the us of the dredge on the job in the Hamilton Field in th

nount of $1841.25, but also an amount for work done at
ie Transport Docks in an amount which petitioner failed
) show (A., p. 282). The Commissioner made no finding
1 the subject (A., p. 167).

The burden is upon the petitioner to comply with the
rovisions of the limitation statute. Unless the gross
eight pending is surrendered, along with the value of the
essel, petitioner has failed to carry that burden, and is
ot entitled to limitation.

In re W. E. Hedger Co. (2d C.C.A.) 59 F. (2d) 982-3.

Petitioner failed in carrying its burden by not having
ie Commissioner find the amount of freight pending and
iereafter surrendering the amount into court. At the
resent time there is no bond for the amount of freight
ending on file.

If limitation is granted, however, freight pending should be included and this comprises gross earnings.

That the contract price of the work at Hamilton Field
iust be added and included as "freight pending" appears
oth by principle and precedent. A similar case is that of

The Captain Jack (D. Conn) 162 Fed. 808

vhere the contract price of raising a sunken vessel was
ncluded as "freight pending." Whatever a ship earns for
er owners is "freight." It makes no difference whether
is earned by carrying cargo or dredging under a con-
ract.

At the trial, the court suggested that only the proceeds
f the contract, and not the full contract price, should be
ncluded. All of the authorities, however, forbid the deduc-

tion of the expenses, but require the full gross freight to be added as "freight pending." This is stated in the case of

In re W. E. Hedger Co. (2d C.C.A.) 59 F. (2d) 982, 983,

where the court discussed the authorities and summarized them as follows:

> "* * * These authorities make it clear that the freight to be surrendered is the gross freight earned without deduction of the expenses of earning it."

In the case of *The Steel Inventor* (D.N.Y.) 36 F. (2d) 399, 400, the court forbade deductions from the "total gross freight".

Recent cases discussing the authorities and following the rule here contended for include

Gale, 1938 A.M.C. 1438, 1455;
City of Fort Worth 1938 A.M.C. 1348, 1349.

The reason for including the gross return from the voyage without any deductions for expenses is that the owner is considered as having put his investment in the one venture at risk. If he has been diligent in providing a seaworthy vessel, he is allowed to limit his loss to what he has invested in the voyage. If those who have a cause of action against the vessel are to be limited to the net proceeds of the voyage, the purpose of the limitation statute is defeated.

CONCLUSION.

The facts of this case show a callous disregard of duty toward a helpless seaman—failure to guard him—failure to send him to one of the nearby hospitals—failure to have effective life saving equipment. The captain thought more of water for his boilers than of sending a helpless man to a hospital.

The faults and the liability are clear.

Nor is appellee entitled to limit liability.

This is a trial de novo. This court can and should enter a decree for appellant in an appropriate amount or else enter an order directing the trial court to do so.

Dated, San Francisco,
December 23, 1938.

Respectfully submitted,
HONE & HONE,
DERBY, SHARP, QUINBY & TWEEDT,
S. HASKET DERBY,
JOSEPH C. SHARP,
Proctors for Appellant.

CHARLES L. HEMMINGS,
DONALD LOBREE,
Of Counsel.

(Appendix Follows.)

Appendix.

Appendix

ASSIGNMENT OF ERRORS.

(A., pp. 295-298.)

I.

The District Court erred in finding for petitioner and against claimant herein.

II.

The District Court erred in rendering a final decree herein in favor of petitioner and against claimant herein.

III.

The District Court erred in finding the above named dredger was properly manned, equipped, supplied and seaworthy. The District Court erred in finding that petitioner did not negligently fail to maintain said vessel as a reasonably safe place on which seamen could do their work. The District Court further erred in finding that petitioner did not negligently fail to equip said dredger and supply it with safe means, materials, appliances or devices. The District Court further erred in finding that at no time did petitioner negligently fail to supply suitable life boat, life preserver or life ring to be used for the rescue of any person going overboard. The District Court erred in not finding that in all of the respects above mentioned petitioner was in fact negligent and did negligently fail to maintain said dredger as a reasonably safe place on which seamen could do their work. The District Court erred in failing to find that the dredger was not properly supplied

with safe means, materials, appliances and devices and i
failing to find that said dredger was not supplied with
suitable life boat, life preserver or life ring to be used fo
the rescue of persons going overboard or any other devic
for the rescue of such persons.

IV.

The trial court erred in finding that the death of Ea
Brashear was proximately caused *his* his own fault and i
tentional act, and in finding that said Earl Brashear inte
tionally jumped overboard. The District Court furthe
erred in finding that petitioner did not have full knowledg
of the condition of said Earl Brashear or the extent, ser
ousness or dangerous character thereof, or that there wa
any danger that he would jump overboard. The Distri
Court further erred in failing to find that petitioner negl
gently and carelessly failed to keep said Earl Brashear i
a safe place on board said dredger and in failing to fin
that petitioner negligently and carelessly failed to preve
the death of said Earl Brashear and negligently and car
lessly permitted said Earl Brashear to jump overboa
and negligently and carelessly failed to attempt to resc
said Earl Brashear.

V.

The District Court further erred in finding said dredg
in all respects seaworthy and properly manned, equipp
and supplied and that petitioner used due care and di
gence to make said dredger in all respects seaworthy. T
District Court further erred in finding that the death

aid Earl Brashear was due to his own wilful and intenonal act, and said petitioner is not in any way accountble therefor.

VI.

The District Court further erred in failing to make any nding in regard to the value of the freight pending at the ermination of the voyage.

VII.

The District Court further erred in finding that the eath of said Earl Brashear was occasioned and occurred ntirely without fault or privity or knowledge on the part f petitioner, or without any fault or negligence on the art of any of its agents, servants or employees and was ot the proximate result of any negligence of petitioner. n the contrary, the District Court erred in not finding hat the death of Earl Brashear was due entirely to the egligence of petitioner and those in privity with it.

VIII.

The District Court further erred in making a conclusion f law that the death of Earl Brashear was not due to any egligence or fault upon the part of petitioner and did not ccur with the privity or knowledge of petitioner. The District Court further erred in not finding that the death f said Earl Brashear was due to the negligence and with he privity of and knowledge of petitioner.

IX.

The District Court erred in making a conclusion of law that petitioner is forever exempted from liability for any and all loss or damage arising from or growing out of the death of said Earl Brashear.

X.

The District Court erred in finding that petitioner is entitled to an injunction perpetually enjoining claimant from prosecuting her actions against petitioner, and from instituting, maintaining or prosecuting any actions or proceedings against petitioner, except an appeal from any decree rendered in the above entitled cause.

XI.

The District Court erred in finding the value of the dredger to be not over $9500.00 and in not finding that the value of said dredger was $12,500.00 or more.

XII.

The District Court erred in not allowing claimant to recover costs.

XIII.

The District Court erred in not finding for claimant and against petitioner for the amount of the claim with interest and costs.

XIV.

The District Court erred in failing to make all the amendments proposed by claimant to petitioner's proposed findings of fact and conclusions of law.

Wherefore, Hazel Brashear, claimant and appellant, prays that said final decree be reversed and that such other decrees and orders as may be just and proper in the premises be made herein.

Dated, San Francisco, California,
August 22, 1938.

Hone & Hone,
Derby, Sharp, Quinby & Tweedt,
Proctors for Claimants and Appellants.

(Endorsed): Filed August 22, 1938.

No. 8982

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HAZEL BRASHEAR, as administratrix of the estate of Earl Brashear, deceased, and on behalf of herself personally and on behalf of Richard Brashear and Gloria Brashear (her minor children),

Appellant,

vs.

UNION DREDGING COMPANY (a corporation), former owner of the Dredger "Carson", her machinery, tackle, apparel, furniture, and appurtenances,

Appellee.

BRIEF FOR APPELLEE.

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Appellee.

BRIEF FOR APPELLEE.

A. STATEMENT OF JURISDICTION.

The District Court, sitting in admiralty, had jurisdiction, under Section 723 of Title 28, Judicial Code, of cases arising under the Limitation of Liability Act (section 4283, Revised Statutes; 46 U.S.C.A., sec. 183). The petition shows the existence of a case arising under the said act. (Apostles, pp. 2-12.)

This court, under Section 225 of Title 28, Judicial Code, has jurisdiction upon appeal to review the final decree of the District Court (Apostles pp. 143-147).

B. STATEMENT OF CASE.

The statement of the case presented by appellant is controverted by appellee, and appellee therefore presents its own statement.

Preliminarily, appellee desires to point out that appellant's statement of the case (Bf. App. pp. 3, 4) does not present "succinctly the questions involved and the manner in which they are raised" as required by the rules of this court (Rule 20, subd. 2 (c).) And appellee also desires to point out that appellant has not complied with subd. (c) of the same rule pertinently requiring, in admiralty cases, "a specification by number of such of the assigned errors as are to be relied upon, with reference to the pages of the record where the assignments appear", and that "each such assignment of error shall be printed in full preceding the argument addressed to it". Preliminarily, appellee therefore urges that appellant's brief does not conform to the rules of this court and, accordingly, that the claims of error therein sought to be asserted should be disregarded.

The recitals from the findings and testimony appearing in appellant's statement of the case do not accurately reflect the findings or the evidence upon which they were based.

Appellant refers to a finding by the trial court that Brashear was ill when he jumped overboard, and prior thereto "had been raving off and on, and off and on was out of his mind" to the knowledge of the master of the dredger. (Bf. App. p. 3; Finding IV, Apostles, p. 138.) But appellant does not refer to the qualifying finding that at no time did appellee "through its servants, agent or employees, or otherwise, have full knowledge of the condition of said Earl Brashear or of the extent, seriousness or dangerous character thereof, or that there was any danger that he would jump overboard". (Finding IV, Apostles, p. 137.) Nor does appellant refer to the express finding that Brashear intentionally jumped overboard and committed suicide by drowning. (Finding IV, Apostles, p. 137.)

Again, appellant refers to a finding by the trial court that when Brashear went overboard the dredger was anchored in the navigable waters of San Francisco Bay opposite Hamilton Field, and a launch alongside of the dredger could have been used to send Brashear ashore. (Bf. App. pp. 3, 4; Finding IV, Apostles, p. 138.) But appellant does not refer to the qualifying finding that at no time did appellee "negligently or carelessly fail to take precautions to remove said Earl Brashear from said dredger to land". (Finding IV, Apostles, p. 137.) Moreover, the captain did not testify, as intimated by appellant (Bf. App. p. 4), that Brashear was not sent ashore to Hamilton Field in the launch because the launch was needed for use in obtaining fresh water for the boilers. (Bf. App.

p. 4.) The testimony of the captain was that a low tide prevented the launch from getting to Hamilton Field, and that such condition would prevail until the following morning and some time after the launch returned with fresh water for the boilers. (Apostles, pp. 276, 277.)

Another reference by appellant is to a finding that a row boat aboard the dredger had been damaged in an accident and was in process of repair at the time of the accident, and that no lifeboat was available for use in attempting to rescue Brashear after he jumped overboard. (Bf. App. p. 4; Finding III, Apostles, p. 136.) Appellant calls attention to the testimony of two witnesses who said that if a lifeboat had been available, it would have been used. (Bf. App. p. 4.) An express finding of the trial court, however, was to the effect that at no time was appellee "negligent or careless in attempting to rescue said Earl Brashear". (Finding IV, Apostles, p. 137.)

The questions involved on the appeal, and the manner in which they were raised, are not disclosed by appellant's statement of the case. Nowhere in the brief is appellee advised as to which particular assignment is being relied upon or argued. In answering appellant's arguments the following general headings will be adopted:

1. The findings of the District Court on ultimate facts were in favor of appellee, and as the findings are not against the weight of the evidence, the decree should be affirmed.

2. The facts of the case establish that appellee gave deceased all the protection to which he was entitled under the law.

3. If the case were one of liability, the petition for limitation of liability should be granted.

C. ARGUMENT.

1. THE FINDINGS OF THE DISTRICT COURT ON ULTIMATE FACTS WERE IN FAVOR OF APPELLEE, AND AS THE FINDINGS ARE NOT AGAINST THE WEIGHT OF THE EVIDENCE, THE DECREE SHOULD BE AFFIRMED.

The controlling rule, as declared in this and other circuits, is that "the decision of the trial court in admiralty cases upon controverted questions of fact will not be disturbed by the appellate court unless clearly against the weight of the evidence".

The Andrea F. Luckenbach, 78 F.(2d) 827, 828 (C.C.A.9);

The Ernest H. Meyer, 84 F.(2d) 496, 500 (C.C.A.9);

Doll v. Scott Paper Co., 91 F.(2d) 860, 862 (C.C.A.3).

In the present case the trial judge repeatedly found in various forms that the death of Mr. Brashear was not caused by any negligence of the appellee. (Apostles, pp. 136-139.) This was a finding of an ultimate fact.

Forsythe v. Los Angeles Ry. Co., 149 Cal. 569, 574.

Appellant is palpably in error in contending that a finding of such character is a mere conclusion to be ignored on appeal. (Bf. App. 8.) Her error consists in failing to recognize the essential difference between ultimate and probative facts, and failing to appreciate that the former control the latter in cases like the present.

Winnett v. Helvering, 68 F.(2d) 614, 615 C.C.A. 9).

Appellant's citation of *Johnson v. Kosmos Portland Cement Co.,* 64 F.(2d) 93 (C.C.A. 6) is not authority to the contrary. (Bf. App. p. 7.) There the trial court found as an ultimate fact that defendant was negligent but that such negligence could not possibly have been a proximate cause of plaintiff's injury. The appellate court accepted the finding on the ultimate fact of negligence, but declared, as a matter of law, that the trial court was wrong on the element of possible causation. Here a different situation exists. The finding on the ultimate fact of freedom from negligence controlled and defeated the scattered half-revealing probative facts upon which appellant relies. Her case does not come within any exception to the general rule that findings of ultimate facts control findings of probative facts.

It must be noted, moreover, that appellant expressly disclaims any challenge of "any of the specific findings of the court below on the question of liability" (Bf. App. p. 7.) This leaves unchallenged the finding of the court "that the death of said Earl Brashear was proximately caused by his own fault and inten-

tional act, in that said Earl Brashear intentionally jumped overboard from said dredger and committed suicide". (Finding IV, Apostles, p. 137.)

Appellant's first point is therefore wholly without merit.

---

2. THE FACTS OF THE CASE ESTABLISH THAT APPELLEE GAVE THE DECEASED ALL THE PROTECTION TO WHICH HE WAS ENTITLED UNDER THE LAW.

Appellant's detailed argument to the contrary (Bf. App. pp. 10-33) is not addressed to any particular assignment or assignments of error, nor is the argument preceded by any printed assignment of error.

By selecting and dissociating parts of the record and superimposing thereon the harshest inferences, appellant has attempted to paint the picture of a callous master of an unseaworthy dredger without means for rescuing men overboard, who, in disregard of the common dictates of humanity in caring for a demented member of the crew, passively and knowingly permitted him to jump overboard and drown because the master deemed it more important to obtain water for the boilers of the dredger than to protect the demented person from his own frenzies.

But when the record is fairly examined, impartially considered, and dispassionately appraised, as the trial judge examined, considered, and appraised it, a far different picture emerges. It then becomes evident why the trial judge found that at no time did appellee "negligently or carelessly fail to take precau-

tions to remove said Earl Brashear from said dredger to land, or negligently or carelessly fail to place said Earl Brashear in a safe place on said dredger, or negligently or carelessly fail to prevent the happening of an accident or the death of said Earl Brashear or negligently or carelessly permit said Earl Brashear to jump overboard, and at no time was said petitioner (appellee) negligent or careless in attempting to rescue said Earl Brashear". (Finding IV, Apostles, p. 137.)

Appellant's argument is split into a number of subdivisions prefaced with a statement of facts (Bf. App. pp. 10-15). Appellee will adopt these subdivisions in the negative, and, in turn, preface them with a statement of facts.

The dredger "Carson" was not self-propelling (Apostles, p. 274), and it was necessary to tow it to points where it was to operate (Apostles, p. 281). On May 17, 1934, and for several days prior thereto it was operating in San Francisco Bay in making a new channel to Hamilton Field in Marin County. (Apostles, p. 270.) On the main deck of the dredger there was an enclosed fireroom 5 or 6 feet wide and 14 or 15 feet long equipped with a wooden bench. (Apostles, pp. 180, 205.) A service launch was made available for the dredger (Apostles, pp. 285, 286), and was usually tied up alongside (Apostles, p. 190). On the deck of the dredger there was a rowboat (Apostles, p. 271), a lifebuoy (Apostles, p. 273), a life line (Apostles, p. 210), and one or more large planks (Apostles, p. 184).

The master of the dredger was Daniel Forsyth, a dredgerman, with 40 years experience. (Apostles, p. 269.) The crew ran from 9 to 14 men and they lived on the dredger. (Apostles, pp. 271, 281.) The channel project was under the auspices of the C.W.A. and men were supplied thereto through hiring halls. (Apostles, pp. 275, 284.) Mr. Brashear, the decedent, was thus supplied three or four days before the accident as a fireman. (Apostles, pp. 274, 275.)

Around 7 o'clock on the evening of May 17, 1934, Brashear complained of headache to Fancort, another members of the crew, and obtained two aspirins. (Apostles, p. 189.) Around 12 o'clock Fancort, and Vogel, another member of the crew, heard a noise in the launch and discovered Brashear babbling on top of the launch. (Apostles, p. 190.) He voluntarily accompanied them to the fireroom and when he seemed all right Vogel left and went to bed leaving Brashear in the companionship of Fancort. (Apostles, p. 190.) Around 1 o'clock Brashear began talking funny and crawled under the bench in the fireroom. (Apostles, p. 190.) Fancort thereupon called Pedersen, another member of the crew, and they persuaded Brashear to again sit on the bench and after talking to him concluded that he was all right. (Apostles, p. 190.) Around 3 o'clock he "got kind of bad again" and Fancort then communicated with Captain Forsyth. (Apostles, p. 191.) According to Forsyth, Fancort reported that Brashear had delirium tremens (Apostles, p. 287), but was "getting along better than he was" (Apostles, p. 276). The matter of taking him ashore

in the launch was discussed, and it was concluded that the state of the tide would not permit landing at Hamilton Field, but that landing could be accomplished when the launch returned with fresh water in the morning. (Apostles, pp. 276, 277.) Captain Forsyth expressed his willingness to assist if necessary, but Fancort suggested that he and Pedersen could take care of Brashear. (Apostles, p. 278.) Both Fancort and Pedersen remained with Brashear until around 4:30 or 5 o'clock at which time Brashear was very quiet and sitting on the bench. (Apostles, p. 207.) Fancort then left to procure a cup of coffee for Brashear (Apostles, p. 207), and during his absence, and without warning Brashear "gave one jump and went out through the door and dove over the side" (Apostles, pp. 175, 183). At no time during the evening or night had Brashear threatened to jump overboard. (Apostles, p. 207.)

At the time Brashear went overboard the rowboat was out of commission and was in process of repairs because of an accident which had happened a day or so previously. (Apostles, pp. 184, 271.) Pedersen threw a large plank into the waters and it came within reaching distance of Brashear, but the latter swam away from the plank, and dived to the bottom two or three times intentionally for the purpose of remaining down. (Apostles, p. 185.) A life line was also thrown to Brashear and he made no effort to take it. (Apostles, p. 258.) The launch, which had left the side of the dredger, was immediately called back, and efforts made to locate Brashear with a grappling hook. (Apostles, pp. 211, 212.)

1. Brashear was properly watched, and not carelessly permitted to jump overboard.

All authorities agree that shipowners are not insurers of the members of their crews, and that the full measure of duty is discharged when the master exercises a reasonable judgment as to obtaining medical or surgical treatment ashore.

The Iroquois, 194 U.S. 240, 243, 48 L.Ed. 955, 958, 24 S.Ct. 640, 641;

The Kenilworth, 144 F. 376, 377-8 (C.C.A. 3);

24 *Ruling Case Law,* 1167, 1168.

That the judgment exercised by Captain Forsyth was a reasonable one is not open to doubt. Brashear's indicated condition was that of alcoholism; and he had quieted down in the surroundings in which he was placed with fellow members of the crew, with whom he was familiar, in attendance. He had exhibited no violence, and had made no threats to jump overboard. Taking him ashore in the nighttime with uncertainty as to his reactions was manifestly a more hazardous course than continuing with rest and quiet. There is absolutely nothing in the record to indicate that the condition was one of urgency requiring that Brashear be taken ashore immediately. Everything in the record indicates that the informed judgment of Captain Forsyth to retain Brashear on board until the morning was the most reasonable judgment under the circumstances.

Most of the cases cited by appellant on the subject involve seagoing vessels and injuries requiring urgent treatment. Much reliance is placed by appellant upon

Russell v. Merchants & Miners Transp. Co., 19 F. Supp. 349 (D.C.Va.) (Bf. App. pp. 16-18) where an epileptic was left unattended on the deck of a vessel. A different factual situation exists in the present case. Brashear was not left unattended, nor was he left on the deck of the vessel. Appellant is grossly exaggerating when she states that "Captain Forsyth thought more of his boilers than of saving the life of Brashear." (Bf. App. p. 18.) According to the *evidence* the launch could not make a landing at Hamilton Field until the turn of the tide in the morning, and when the launch returned with water in the morning *before the turn of the tide* (Apostles, pp. 276, 277) it was planned with Brashear's companions to take Brashear ashore to Hamilton Field. Appellant is also grossly exaggerating when she states that "Fancort was . . . afraid that Brashear would jump overboard". (Bf. App. p. 19.) In answer to the question, "He had not threatened to jump overboard at any time, did he?" Fancort replied, "No." And in answer to the question, "Were you afraid he was going to jump overboard or something?" Vogel said, "I was not."

2. The law did not require the master to send Brashear to a hospital.

Because hospitals were available at some of the bay ports, appellant argues that it was the duty of the master to take Brashear to one of such hospitals. (Bf. Resp. p. 22.) As pointed out in the previous subdivision, the matter is controlled by the exercise of reasonable judgment on the part of the master.

The judgment exercised by Captain Forsyth was plainly a reasonable one under the circumstances, and the weight of the evidence is in accordance with the finding of the trial court "that at no time did said petitioner (appellee) negligently or carelessly fail to take precautions to remove said Earl Brashear from said dredger to land". (Finding IV, Apostles, p. 137.)

3. **The fact that the rowboat was out of commission was not a proximate cause of the death.**

Appellant cites a number of cases along the line that the absence of a usable lifeboat was negligence. But actionable negligence also involves the element of proximate cause. The trial court found that "the said Earl Brashear jumped overboard from said dredger and was drowned; that the death of said Earl Brashear was proximately caused by his own fault and intentional act, in that said Earl Brashear intentionally jumped overboard from said dredger and committed suicide". (Apostles, p. 123.) The weight of the evidence abundantly supports the foregoing finding which appellant has not challenged. When a plank was thrown to Brashear in the water and was within his reach and a means of rescue had been provided, Brashear deliberately avoided it, dived away from it, and kept diving to the bottom of the waters until he was drowned. This was the testimony of Fancort, an eye witness to the occurrence (Apostles, pp. 210, 211); this was the testimony of Pedersen, another eye witness (Apostles, pp. 184, 185); and this was also the testimony of Vogel, likewise an eye witness (Apostles, p. 258).

Under such circumstances the element of proximate cause in so far as the rowboat being out of commission was concerned, was left to speculation and conjecture.

New York Cent. R. Co. v. Grimstad, 264 F. 334, 335 (C.C.A. 2).

4. Appellee used proper care.

In the concluding portion of the argument addressed to this subdivision appellant argues that Brashear should have been tied up. (Bf. App. p. 33.) When asked the question, "Why didn't you tie him up?" Fancort replied, "Because it was not necessary." (Apostles, p. 215.) The evidence therefore supplies the answer to appellant's insinuation that Brashear should have been tied. (Bf. App. p. 33.)

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3. IF THE CASE WERE ONE OF LIABILITY, THE PETITION FOR LIMITATION OF LIABILITY SHOULD BE GRANTED.

When the trial court decreed exoneration and exemption from liability, the question of limitation of liability of course became immaterial. It is argued in the brief for appellant as a reserve point.

Upon proof that the dredger was seaworthy, that no officer of the corporation was on board, and that the master was competent, the petitioner (appellee) proved a prima facie case for limitation.

The George W. Pratt, 76 F.(2d) 902 (C.C.A. 2).

All these elements concurred in the present case.

On the question of seaworthiness, the evidence was plenary. In this regard it is sufficient to refer to the

testimony of Captain Forsyth. (Apostles, pp. 270-274.) There was no contention that any officer of the corporation was on board. And the rule is general that "when the owner is a corporation, the privity or knowledge must be that of its managing officers".

The Princess Sophia, 61 F.(2d) 339, 346.

In view of the testimony showing that Captain Forsyth had 40 years experience as a dredgerman, his competency cannot seriously be questioned. (Apostles, p. 269.)

The record will not support the statement of appellant that Forsyth was appellee's "marine superintendent". (Bf. App. p. 34.) According to the record, the president and managing agent of the corporation was Edward Haas. (Apostles, pp. 148-151.) And according to the record Forsyth, at most, was merely master of the dredger. (Apostles, p. 151.) Knowledge and privity of Forsyth, if any existed, was not the knowledge and privity of appellee, and appellee could limit its liability even though the master was negligent.

The Princess Sophia, 61 F.(2d) 339, 346 (C.C.A. 9).

A contention advanced by appellant is that Mr. Haas was derelict in discharging the duty of seeing that life saving equipment was on the dredger. (Bf. App. p. 36.) In an earlier portion of this brief reference was made to the record disclosing full equipment in such respect. If the equipment was there, Mr. Haas' lack of personal knowledge of its presence can in no way dislodge the fact that the dredger was properly equipped.

When the value of the dredger was appraised by the Commissioner in the limitation proceedings (Apostles, pp. 82-90), appellant made no point concerning "pending freight" nor did she except to the Commissioner's Report. The claim is now urged that the sum of $1841.25 should have been included in such respect. (Bf. App. pp. 38, 39.) The contention seems belated.

CONCLUSION.

For the several reasons herein appearing, it is therefore respectfully submitted that the decree of the district court should be affirmed.

Dated, San Francisco,
January 20, 1939.

REDMAN, ALEXANDER & BACON,
JAMES M. WALLACE,
HERBERT CHAMBERLIN,
Proctors for Appellee.

No. 8982

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HAZEL BRASHEAR, as administratrix of the estate of Earl Brashear, deceased, and on behalf of herself personally and on behalf of Richard Brashear and Gloria Brashear (her minor children),

Appellant,

vs.

UNION DREDGING COMPANY (a corporation), former owner of the Dredger "Carson", her machinery, tackle, apparel, furniture, and appurtenances,

Appellee.

REPLY BRIEF FOR APPELLANT.

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No. 8982

IN THE

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Appellee.

REPLY BRIEF FOR APPELLANT.

A. STATEMENT OF CASE AND ASSIGNMENT OF ERRORS.

THE SPECIFIC FINDINGS OF FACT IN THIS CASE OVERRULE THE GENERAL FINDINGS PARTICULARLY AS THE COURT DID NOT WRITE ANY OPINION.

In our opening brief we sincerely tried to make a scrupulously honest statement of the facts of the case and carefully supported every statement of fact with references to the record.

We are surprised to find that statement "controverted" and to be charged in two instances (Reply Brief p. 12) of "grossly exaggerating". On the contrary, the evidence supports every statement made by us and counsel offers no evidence to the contrary as we shall later point out.

The entire method by which appellee seeks to avoid the uncontradicted facts in the case is very obvious. To every specific finding by the trial court and to every piece of specific testimony against the dredge owner appellee sets up the general findings that petitioner was not negligent.

However, we pointed out in our opening brief (p. 7) that all the general findings were against us, but that the specific findings were for appellant. The general findings were submitted by petitioner and the specific findings added by the court at our request.

For example let us take Finding III (Apostles p. 135). In the last paragraph the court finds generally that at "no time did said petitioner * * * negligently fail to provide a suitable life boat". Yet in the same finding it specifically finds that "At the time Brashear went overboard, there was no lifeboat or any other boat which could have been used in an attempt to save his life". It does specifically find that the only lifeboat had been smashed on May 15, 1934, whereas Brashear was drowned on May 17, 1934.

Now what good does this general finding do appellee in the face of a specific finding?

Again, in the next finding (Apostles pp. 137-8), there is a general finding that petitioner did not have full knowl-

edge of Brashear's condition. Yet there is a specific finding (p. 138):

> "At the time said Earl Brashear went overboard, he was ill. For some hours prior thereto, he had been raving off and on, and off and on was out of his mind. The master, Dan Forsyth, knew of his condition."

Again the court finds generally that the death of Brashear "was due solely to his own wilful and intentional act". Yet the court specifically finds that "at the time said Brashear went overboard, he was ill. For some time prior thereto, he had been *raving off and on, and off and on was out of his mind"* (Apostles p. 138).

We respectfully submit that a man out of his mind and raving cannot commit an intentional act.

Yet again: the trial court finds generally that there was no negligence on the part of petitioner in caring for Brashear (Finding VII, Apostles p. 139). Yet it specifically finds (R. p. 138) that there was a launch that could have been used to take Brashear to a hospital and, as already seen, that there was no effective lifeboat on board to be used to save his life.

IN VIEW OF THE TRIAL COURT'S FAILURE TO WRITE AN OPINION, HIS SPECIFIC FINDINGS OF FACT SHOULD CONTROL HIS GENERAL FINDING.

This court has repeatedly called the attention of the trial court to the advisability and the desirability of writing an opinion to assist the judges on appeal. This circuit has complained when "the trial court has not

favored us with the opinion customarily given in admiralty cases".

The Silver Palm, 94 F. (2d) 754, 756.

Where general findings are contradicted by specific findings, we submit that on appeal the latter should control.

ASSIGNMENTS OF ERROR.

Counsel for the barge owners complain that our opening brief fails to comply with Rule 24 (d) of this court requiring assignments of error to be printed in full preceding the argument addressed to it. However, the same rule permits the assignments to be printed in full in an appendix where the specified error is more than two printed pages in length.

As the principal point upon which our appeal is based is simply that the trial court failed to find want of proper care by the dredge owner we saw no point in printing the assignments of error in the body of the brief and therefore availed ourselves of that part of the rule permitting printing the assignments in an appendix. We did this because it seemed simpler and only after examining other briefs adopting the same method.

However, we do not want to embarrass our client by any argument over procedural matters and are therefore asking leave of court to replace two of the printed pages to insert assignments of error or summaries thereof in the body of the brief.

B. THIS IS AN ADMIRALTY APPEAL AND CONSTITUTES A TRIAL DE NOVO.

Appellee makes no attempt to dispute the rule that an appeal in admiralty is a trial *de novo.* It attempts to rely on the general findings of the court that there was no negligence, in the face of specific findings which we believe require a reversal, and in the face of the fact that substantially there is no conflict in the testimony.

In not a single instance has appellee pointed out a single conflict in the testimony but relies primarily upon the fact that the court made general findings that there was no negligence, ignoring the fact that after the dredge owner submitted the general findings the court added the specific findings upon which we rely.

We submit however that upon uncontradicted testimony this court in a trial *de novo* on appeal can make its own general findings on conclusions.

C. ENTRUSTING BRASHEAR TO TWO SLEEPY CREW MEMBERS WITHOUT RELIEF THROUGHOUT THE NIGHT WAS NOT PROPER CARE OF HIM IN HIS RAVING CONDITION.

Preliminarily let us object to appellee's gratuitous and unsupported statement (Their Brief p. 11) that "Brashear's indicated condition was that of alcoholism". The record is replete with evidence to the contrary. All agreed that there was no liquor aboard the dredge (Apostles pp. 192, 179, 186, 284) and that there was no odor of liquor on Brashear's breath at the time he was sick (Apostles p. 192). There had been no drinking aboard the dredge

(Apostles p. 212). Brashear had never acted this way before (Apostles pp. 192, 229) but had been a healthy normal person (Apostles pp. 232, 235, 236, 250, 192, 230) and was "always in perfect health" (Apostles pp. 221, 228, 232, 253). There was testimony that Brashear drank but that he was not a heavy drinker (Apostles pp. 213, 229, 236, 221, 238), and testimony of his having been drunk once in 1931, three years before his death (Apostles pp. 246, 247, 249).

Appellee dismisses the case of

Russell v. Merchants etc. Co., 19 F. Supp. 349,

with the alleged distinction that the deceased there was "left unattended". This is not true. As seen from the opinion quoted on page 17 of our opening brief, the basis of the court's decision is the conduct of the crew in *"allowing him to break away from them"*. Here one sleepy unrelieved crew member was all that was guarding Brashear at the time he went to his death.

Counsel argue that Mr. Forsyth did not know Brashear was in danger of jumping overboard. If this is true, why did he suggest tying Brashear up, and why did two men stay up with him during the night? Counsel refer to Vogel's statement that he (Vogel) was not afraid of Brashear going overboard.

But this was four or five hours previous. Vogel had gone to his bunk about one o'clock after staying around altogether only 15 minutes (Apostles p. 257), and Fancort who apparently did not share Vogel's opinion, immediately called Pedersen down to help.

This is one of the gross exaggerations we are accused of by appellee.

D. BRASHEAR WAS NOT SENT TO A HOSPITAL BECAUSE FORSYTH THOUGHT WATER FOR THE ENGINES WAS MORE IMPORTANT THAN BRASHEAR'S LIFE. THE ONLY LAUNCH AVAILABLE USED TO GET WATER WHEN IT COULD HAVE BEEN USED TO SEND BRASHEAR TO A HOSPITAL.

Brashear was not sent to a hospital because Forsyth thought that fresh water for his engines was more important than Brashear's life. The only launch available was used to get the water when it could have been used to send Brashear to a hospital. In our opening brief, pages 20 to 22, we presented the evidence that supports our point that "Captain Forsyth thought more of the boilers than of saving the life of Brashear". Appellee accuses us of gross exaggeration in spite of the fact that we quoted the finding of the court and the uncontradicted admission of Forsyth himself that supported our argument in this connection. Then appellee attempts to justify his weak position by stating (Their Brief p. 12) that it was planned by Brashear's companions to take Brashear to Hamilton Field. The utter ridiculousness of this alibi was brought out later in the trial when it was admitted that Hamilton Field was uncompleted and had no hospital facilities whatever. The argument that they could not go to Hamilton Field until the turn of the tide thus turns out to be one of the gross exaggerations that appellee has in mind. However we submit that this gross exaggeration is set forth in appellee's brief, not in ours, and is not supported by the record.

As seen in the opening brief (pp. 20-22), the court found (Apostles p. 138) that there was a launch alongside which could have been used to send Brashear ashore. In fact the launch was there until a few minutes before Brashear

went to his death. During the long hours that Brashear was raving, during the several times that tying him up was discussed, the launch was there and could have been used, but the master preferred the water instead of Brashear's life.

Brashear did not go overboard until about 4:30 or 5:00 o'clock (Apostles p. 286) and the launch had gone on its way just before then (Apostles p. 178). She was only a mile and a half away at the time but too far away to come back.

Appellee now contends that Forsyth intended to take Brashear ashore to Hamilton Field when the tide turned in the morning, but later admitted that this would have done no good because there were no hospital facilities at Hamilton Field. Thus he admitted (Apostles p. 276) at that time that "Hamilton Field had not been completed".

He was asked:

> "Q. Did you know whether or not there was a hosptial there?
>
> A. I think they were building it then, it was not finished."

The real reason why the launch was not used to send Brashear ashore was admitted by the captain as follows:

> "Q. What prevented you using the launch?
>
> A. We were sending the launch over to McNear Point for fresh water."

E. HAD THERE BEEN A LIFE BOAT, THERE WERE MEN THERE ABLE AND WILLING TO SAVE BRASHEAR'S LIFE.

Captain Forsyth admitted that when Fancort first came up to talk to him about Brashear's condition "that launch was tied alongside" (Apostles p. 286). This was at the time that Fancort told him Brashear was "in pretty bad shape" (Apostles p. 275). The captain apparently realized the seriousness of the situation for, as already seen, he recommended tying Brashear up, but instead of using the launch to send Brashear ashore to a hospital preferred to use it for water for the boilers.

Appellee is in no position to argue that Brashear might have died even had there been a lifeboat. In view of the fact that the court found that Brashear was out of his mind, it is idle to say that Brashear did not want to assist in his own rescue and ignored the plank thrown to him. It is for just such circumstances as these that a lifeboat is necessary. The only support counsel cite for such argument is the *Grimstad* case which it quotes in spite of the fact that we pointed out in our brief (pp. 31, 32) that when in the *Harris* case the trial court relied on the same case, it was reversed on appeal.

F. PETITION FOR LIMITATION SHOULD BE DENIED.

The only argument appellee seems to make is that it is not bound by the knowledge and privity of its master. However, Forsyth in this case was admitted to be petitioner's marine superintendent.

CONCLUSION.

This court should enter a decree for appellant or direct the trial court to do so.

Dated, San Francisco,
January 30, 1939.

Respectfully submitted,
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No. 8982

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Appellant,

vs.

UNION DREDGING COMPANY (a corporation), former owner of the Dredger "Carson", her machinery, tackle, apparel, furniture, and appurtenances,

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

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UNION DREDGING COMPANY (a corporation), former owner of the Dredger "Carson", her machinery, tackle, apparel, furniture, and appurtenances,

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellee respectfully petitions for a rehearing in the above entitled cause upon the following grounds:

1. The majority opinion has inadvertently misconceived the facts.

2. The majority opinion has inadvertently misconceived the law.

(1)

THE MAJORITY OPINION HAS INADVERTENTLY MISCONCEIVED THE FACTS.

The majority opinion states: *"The facts on which we base our decision are undisputed."* Recitals then follow. But most of the "facts" so recited are seriously disputed in the record; many are contrary to the record; many have no foundation whatever in the record. This finds ready demonstration by setting forth the recital and then quoting evidence in the record on the same subject or pointing out the lack of evidence on the subject.

(a) *"He (Brashear) sent for Fancort, a fellow member of the crew, who found him in bed, in distress. Fancort gave him some aspirin and left him lying in bed."*

Fancort testified:

> "A. He (Brashear) sent a man down for me; he said that he was not feeling well and he wanted to see me.
>
> Q. Then what happened?
>
> A. Well, I left a man in my place and went up and gave him a couple of aspirins to quiet him down. He said he had a headache.
>
> The Court. Q. Was he lying down at that time?
>
> A. Yes.
>
> Q. In a bunk?
>
> A. In a bunk. * * *
>
> A. I went right down below on watch again and I never heard any more of him until after I closed down that night." (Ap. p. 189.)

(b) *"About midnight, Vogel, another member of he crew, and Fancort saw Brashear on the launch tied t the stern of the dredge. He was leaning over, talking to some imaginary person.*

Vogel testified:

"Q. You heard Mr. Fancort testify that the two of you went down there and you saw Brashear kneeling and mumbling in the boat?

A. Not on the launch.

Q. Where was that?

A. That was afterwards.

Q. You did not see what Mr. Fancort testified to on the launch?

A. No. I did not see him kneeling on the launch.

Q. You did not hear him mumbling?

A. No." (Ap. pp. 268-269.)

(c) *"So Vogel held the launch while Fancort compelled Brashear to come on the dredge with him."*

Vogel testified:

"Q. Did he (Fancort) call him (Brashear) a number of times?

A. Yes.

Q. He didn't even answer?

A. No.

Q. And then he went over on the launch?

A. Yes.

Q. And what happened?

A. Jack (Fancort) took him by the arm and the man came right up." (Ap. pp. 267-268.)

(d) *"He (Fancort) evidently was afraid that Brashear was going to jump overboard and asked Vogel to stay with him to guard Brashear."*

Fancort testified:

"Q. He had not threatened to jump overboard at any time, did he?

A. No." (Ap. p. 207.)

"Q. At the time you were discussing Brashear's condition with the captain did you discuss with him the danger of Brashear jumping overboard and the possible advantage of tying him up?

A. No. . . . * * *

Q. Why did you tie him up?

A. Because it was not necessary." (Ap. pp. 214-215.)

Vogel testified:

"Q. Isn't it a fact that Brashear was acting very peculiar, and you and Fancort thought that fellow was going to jump overboard if you did not get him back in?

A. No.

Q. When you got him off the launch you stayed there with him, and you didn't think he was going to jump overboard?

A. No, he didn't act like he was going to jump overboard in the fire-room.

Q. Why did you stick around for an hour?

A. I wanted to be around in case something should happen.

Q. What were you afraid would happen?

A. He had no business on the launch, that is all I know.

Q. Why did you stay an hour with him in the fire-room?

A. I stayed with Jack.

Q. Just for sociability sake?

A. Yes.

Q. So when you asked Jack, 'Is it all right for me to leave you alone with him,' you mean it was all right to leave for sociability sake?

A. No, not in that way.

Q. Isn't it a fact, Mr. Vogel, that Brashear was acting peculiar on the launch, that he was acting peculiar in the room, and you thought that you would help Fancort to take care of and keep him from jumping overboard?

A. No." (Ap. pp. 264-265.)

Fancort testified:

"A. I went over and took hold of him (Brashear) and got him to come ashore and I brought him in the fire-room and talked to him and he seemed to be all right; so Carl said that he would be all right, and he went up and went to bed and I was there alone with him." (Ap. p. 190.)

(e) *"Vogel stayed about 15 minutes and when Vogel left to go to bed about 1 a.m. Fancort had another fireman named Pedersen get out of bed to come down."*

Vogel testified:

"Q. Why did you stick around for an hour?

A. I wanted to be around in case something should happen.

Q. What were you afraid would happen?

A. He had no business on the launch, that is all I know.

Q. Why did you stay an hour with him in the fire-room?

A. I stayed with Jack.

Q. Just for sociability sake?

A. Yes." (Ap. p. 264.)

Fancort testified:

"A. * * * I brought him in the fire-room and talked to him and he seemed to be all right; so Carl said that he would be all right, and he went up and went to bed and I was there alone with him.

Q. Then what happened?

A. Well, in maybe three-quarters of an hour or an hour afterwards he kind of went out of his head. * * *

A. * * * and that is the time I went up and called Mr. Pedersen * * *." (Ap. p. 190.)

Pedersen testified:

"A. Well, he was raving around there and was out of his head, praying and asking for something. * * *

A. Well, Brashear was out of his head there off and on, and we were watching him, that was all we could do.

Q. You did not tie him up or anything?

A. No, there was no tying him up; he was not violent, or anything, just running around, and we standing there watching him and talking to him." (Ap. p. 174.)

"Q. During the time when he was talking did he say anything about a drink?

A. He asked for a drink." (Ap. pp. 185-186.)

(f) *"At 3 o'clock, Fancort evidently became desperate and went up to ask Captain Forsyth what to do. He told Forsyth that Brashear was in 'bad shape', that he was 'pretty bad', but 'maybe he could take care of him'."*

Fancort testified:

"A. Well, about three o'clock or somewhere around in there he got kind of bad again, and so I went up and told the captain about it." (Ap. p. 191.)

Forsyth testified:

"A. He told me he was in pretty bad shape; he asked me what we were going to do with him, and I asked him, 'Can you take care of him?' He said, 'Why'—he says, 'he is getting along better now than he was.' " (Ap. pp. 275-276.)

"Q. When Mr. Fancort reported to you about Mr. Brashear did he state whether he had quieted down, or what did he say in regard to that?

A. Well, he said he was pretty bad there for a while, he said maybe he could take care of him, he was going to call Pedersen.

Q. He said he was going to call another man to help him?

A. Yes." (Ap. pp. 277-278.)

(g) *"The captain discussed tying the man up and liscussed the question of sending Brashear ashore in he launch to a hospital. There was a launch then vailable for this purpose. However, it developed that ie thought they needed the launch to go after water or the boilers on the dredge, and the captain told Fancort to wait until after the launch was used to get he water. Thereafter they intended to take Brashear o a hospital."*

Fancort testified (morning session):

"A. Well, about three o'clock or somewhere around in there he got kind of bad again, and so I went up and told the captain about it.

Q. What did the captain tell you?

A. The captain said we had better send him ashore, as soon as the launch comes back from taking water, I believe he said.

Q. Was the launch there at the time?

A. Yes.

Q. Did he say anything to you about tying him up?

A. No, I would not say he did.

Q. I am not asking you whether he would. As a matter of fact, was there any conversation or any discussion between you and the captain as to tying Brashear up?

A. No, not that I can remember." (Ap. p. 191.)

Fancort testified (afternoon session):

"Q. When you spoke to the captain the captain told you he would arrange to have Brashear taken ashore when the boat came back from the water?

A. Yes." (Ap. p. 209.)

"Q. At the time you were discussing Brashear's condition with the captain did you discuss with him the danger of Brashear jumping overboard and the possible advantage of tying him up?

A. No, I told the captain that the man seemed to be out of his head, and I believe the captain said something about 'We will have to tie that man like we did the other time until we get rid of him,' or something of that sort.

Q. What did he mean by 'the other time'?

A. I don't know, the Captain said there was another man went that way and they had to tie him up.

Q. Did the captain tell you to tie him up, or advise you to, or what?

A. Well, he said we would have to tie him up if he got any worse, to let him know. * * *

Q. Why didn't you tie him up?

A. Because it was not necessary." (Ap. pp. 214-215.)

Forsyth testified:

"A. * * * Then he (Fancort) spoke of taking him in, we would take him in with the boat, and I said, 'You cannot get in with the boat, the tide is too low,' the tide was ebbing, 'and you can't get him in until,' it would have been around eight or nine o'clock, before we could have gotten the man in, if we went over the bar." (Ap. p. 276.)

"Q. In other words, you could not get the launch into Hamilton Field until sometime after they came back with the water; is that right?

A. Yes.

Q. Did you tell Mr. Fancort he would be taken over to Hamilton Field after the launch came back from water?

A. Yes.

Q. That was your plan?

A. Yes." (Ap. p. 277.)

"Q. * * * At that time didn't you discuss the advisability of tying him up?

A. Well, we spoke of that, but Fancort thought it was not necessary, they could take care of him.

Q. You had discussed the fact with Mr. Fancort that on a previous occasion you had tied a man up?

A. Yes, he had the snakes.

Q. And the other man had snakes?

A. Yes.

Q. * * * Did Mr. Fancort tell you that Brashear wanted to jump overboard, or was trying to?

A. No, he did not." (Ap. p. 279.)

"A. I said 'Maybe we had better tie him up,' and he said, 'No, I have Pedersen down there and I think we can hold him, he is quieting down, and I think he will be all right.' (Ap. p. 280.)

"A. Well, we talked about taking him in, and I said there would be no use; we were talking about taking him over to McNear's Point, and I said, 'There is no use taking him over there, and we had better wait until the launch comes back,' when the tide would come in we could take him to Hamilton Field and some of the boys had machines there and could have run him in." (Ap. p. 287.)

(h) *". . . It is obvious that the real explanation is that he was more interested in getting water for his dredge than seeing that Brashear was given the medical attention necessary for a man in his condition. First aid would have been useless."*

According to the record, Brashear came aboard the dredge three or four days before his death. (Ap. p. 173.) He was under the influence of liquor at the time. (Ap. p. 284.) When directly interrogated on

hat subject, Captain Forsyth said, "When him (Brashear) and Fancort came on the Sunday they both were feeling pretty good". (Ap. p. 284.) His condition, as reported to Captain Forsyth by Fancort, was that of delirium tremens, commonly called "the snakes". (Ap. pp. 279, 287.) The record contains no testimony as to what medical attention is necessary for a man in that condition; no testimony that hospitalization is necessary; no testimony that "first aid would have been useless". Abstinence from liquor is doubtless the most effective cure, and common knowledge has perhaps taught that sedatives, such as bromides, are the standard first aid treatment in such cases and often the only necessary treatment. The suggestion of Fancort, a drinking companion of Brashear's (Ap. p. 284), and a friend of ten years (Ap. p. 188) was that Brashear be taken to Hamilton Field. (Ap. p. 276.) This was not for the purpose of hospitalization, but to obtain an automobile (Ap. p. 287) for the obvious purpose of taking him to his wife and family. The condition of the tide prevented that from being done until the next morning after the return of the launch. The charge levelled against Captain Forsyth that he thought more of getting water for the dredge than taking the man ashore will not stand the scrutiny of the record.

(i) *"Things got so bad that about 4:30 a. m. Fancort again went to see Forsyth as to what could be done. They again discussed the propriety of tying up Brashear or sending him to the hospital. It was*

again decided not to send Brashear ashore until after the water was obtained for the dredge."

Forsyth testified:

"Q. The time that you discussed the tying up of Mr. Brashear was the first time or the second time?

A. THE FIRST." (Ap. p. 286.)

"Q. The second time was when?

A. I asked him how he was, and he said he was raving pretty much, and then he got Pedersen up to hep him, and I said 'If you need any help I will get up, too.' He said, 'No, we can take care of him, there are both of us down there, and I will hold him until we take him ashore.'"

Pedersen testified:

"A. Around about, I think it was around about half past four or along about that time, Jack Fancort said, 'I think I will go up and get a cup of coffee,' and the boy was quieted down quite a bit there then, so I said, 'All right, you go up, Jack,' and he (Brashear) was sitting on a bench and I was sitting there, and the man was sitting on this side, and there was a door going out on the deck, and I was tired, sitting there watching him all night, and he seemed to be all right . . ." (Ap. p. 185.)

Fancort testified:

"Q. And then the two of you stayed with Mr. Brashear until about half past four, did you say?

A. Yes, about that, around half past four or five o'clock.

Q. You say about four thirty or five o'clock you heard the steward, the cook upstairs?

A. Yes.

Q. At that time Mr. Brashear was quiet, was he?

A. Yes.

Q. And was sitting on the bench?

A. Yes.

Q. He had not threatened to jump overboard at any time, did he?

A. No.

Q. So then you said you would get some coffee for him?

A. That is right." (Ap. pp. 206-207.)

(j) *"Fancort finally left Forsyth with the assurance that he thought Pedersen and he could hold Brashear until the Captain was ready to send him ashore."*

Forsyth testified:

"Q. He called you twice?

A. Yes.

Q. The second time was when?

A. I asked him how he was, and he said he was raving pretty much, and then he got Pedersen up to help him, and I said, 'If you need any help I will get up too.' He said, 'No, we can take care of him, there are both of us down there, and I will hold him until we take him ashore.' " (Ap. p. 278.)

(k) *"When Fancort returned to the engine room, Brashear was having one of his quiet intervals. Fancort then went up to get a cup of coffee."*

The record CONCLUSIVELY shows that Fancort did not return to the engine room after the second visit to Captain Forsyth. The record also CONCLUSIVELY shows that Fancort remained with Brashear until he went for the cup of coffee.

Fancort testified:

"A. Well, about three o'clock or somewhere around in there he got kind of bad again, and so I went up and told the captain about it. * * *

Q. Then what did you do next?

A. Well, I went back down again and stayed with him and talked to him, UNTIL I heard the cook up, and I said, 'Well, I will go up and get a cup of coffee, and see if that will quiet him down.' I went up and told the cook what happened and I heard Pedersen holler that Earl had jumped overboard." (Ap. p. 191.)

Pedersen testified:

"Q. Do you remember about what time it was when Mr. Fancort went to speak to Captain Forsyth?

A. Well, I should judge it was about around three o'clock, or a little after." (Ap. p. 182.)

"A. Well, around three o'clock Jack Fancort went up to see the Captain. . . ." (Ap. p. 174.)

"A. Around about, I think it was around about half past four or along about that time, Jack Fancort said, 'I think I will go up and get a cup of coffee,' and the boy was quieted down quite a bit there then, so I said, 'All right, you go up, Jack,' and he was sitting on a bench and

I was sitting here, . . . and all of a sudden he gave one jump and went out through the door and dove over the side . . .'' (Ap. p. 175.)

(l) *'' . . . nothing could be done except to stand nd watch the man drown.''*

Pedersen testified:

''A. There was a big plank laying alongside of the house there, and by that time the steward and Jack were down on deck with me, so me and the steward picked that plank up very fast and threw it out at him, and it came within two feet of him, and he never made any attempt to take it; in other words, he was trying to go away from the plank. * * *

A. . . . he could have put his hands on the plank. * * *

A. He swam away from it. * * *

Q. In other words, it was the case of a drowning man coming to the surface, but he was intentionally diving down?

A. Intentionally, to my observation, he was trying to get down to the bottom, and every time he came up he would go down.'' (Ap. pp. 184-185.)

Fancort testified:

''A. I believe there was a line thrown, I am not positive now. I knew they threw the plank.'' (Ap. p. 200.)

''A. There was a plank that Pedersen and the cook threw out. * * *

A. * * * Somebody threw a line out.'' (Ap. pp. 210-211.)

Vogel testified:

"A. When I came out on deck the plank was overboard. I didn't see when the plank was thrown overboard. * * *

A. He swam away from it. * * *

A. It was between 16 and 18 feet long. * * *

A. I think there was a small plank thrown out after that, it was not a big plank, it was about six or eight feet. * * *

Q. A heaving line was thrown out?

A. Yes.

Q. Did he make any effort to take that?

A. No." (Ap. p. 258.)

(m) *"The captain knew Brashear was in the heat of the fireroom with its bench as the sick man's only resting place . . . yet he neither sent Brashear to be confined in his cabin where he could have rested in bed while attended by his shipmates—nor much less did the captain put him to bed in his own cabin where Brashear better could have been cared for."*

There is no evidence in the record that there was heat in the fireroom. The evidence shows the contrary. The dredge had no motive power, but had to be towed from place to place. (Ap. p. 274.) The dredge had been "closed down" and the lights put out at 12 o'clock. In this respect Fancort said, "I never heard any more of him until after I closed down that night". "After we closed down and put the lights out and everything out, Carl Vogel and I went out on deck." (Ap. p. 189.) Accordingly, there was no proved fact in the case justifying an inference that there was heat in the fireroom at any time while

Brashear was there. The majority opinion also assumed that Brashear had a private cabin on the dredge equipped with a comfortable bed adapted to caring for those having "the snakes" and that his shipmates could have better attended him in this "cabin". But the record merely shows that Brashear had a "bunk" somewhere on the dredge. (Ap. p. 189.) Where it was located is not a matter of record, and for aught that appears in the record it might have been impossible for his shipmates to have attended him in this "bunk". On the contrary, the record shows that the fireroom was large (Ap. p. 205) and enclosed (Ap. p. 209). Surely, the shipmates of Brashear with their knowledge of conditions on the dredge were in a position to say whether better care could be given him in the fireroom than in his "bunk".

(n) "*. . . the insane man . . .*"

All that the record shows is that Brashear had delirium tremens ("the snakes"). He came aboard under the influence of liquor; he asked for liquor in the fireroom; and it is a reasonable assumption that he went on the launch with the idea of going ashore and getting more liquor. His condition, as the record has it, was essentially alcoholic. "Alcoholism", not "insanity", is the proper appellation for Brashear's condition. He was not insane: he was "sick" only to the extent that he was excessively alcoholic.

When the RECORD FACTS are compared with the "facts" recited in the majority opinion as "undisputed", it is therefore manifest that the majority

opinion has inadvertently misconceived the facts. The trial court, it is submitted, appraised the facts with more accuracy. And "the decision of the trial court in admiralty cases upon controverted questions of fact will not be disturbed by the appellate court unless clearly against the weight of the evidence".

The Andrea F. Luckenbach, 9 Cir., 78 F. 2d 827, 828;

The Ernest H. Meyer, 9 Cir., 84 F. 2d 496, 500;

Doll v. Scott Paper Co., 3 Cir., 91 F. 2d 860, 862.

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(2)

THE MAJORITY OPINION HAS INADVERTENTLY MISCONCEIVED THE LAW.

The majority opinion imposes upon those operating dredges the inflexible duty of equipping the dredge with a "life boat" and maintaining the same in efficient condition. It is said:

> "He should have got another boat at the same time he got the lumber, but did not think to get this other boat until Brashear was drowned."
>
> "Since the obligation of the captain was . . . to keep available a life boat for rescue purposes . . ."

There is, however, no such duty known to the law. The regulations respecting life boats extend only to ocean, lake, and sound steamers and foreign vessels. 46 U.S.C.A., section 481, provides:

> "Every steamer navigating the ocean, or any lake, bay, or sound of the United States, shall

> be provided with such numbers of lifeboats, etc. . . . as will best secure the safety of all persons on board such vessels in case of disaster; and every seagoing vessel carrying passengers, and every such vessel navigating any of the northern or northwestern lakes, shall have the lifeboats required by law . . . Provided, That foreign vessels leaving ports of the United States shall comply with the rules herein prescribed as to life-saving appliances. . . ."

The dredge in question had no motive power, but had to be towed from place to place. By no stretch of any existing law was it required to have or maintain a lifeboat. It carried a "rowboat" for convenience. There was no duty resting upon it to do so. The existence or condition of the row boat was utterly alien to the merits of the claim in the trial court or on appeal.

The majority opinion imposes upon the master of the dredge a greater duty than that of exercising A REASONABLE JUDGMENT as to obtaining medical or surgical treatment ashore. The law exacts nothing more than a REASONABLE JUDGMENT from him.

The Iroquois, 194 U.S. 240, 243, 48 L.Ed. 955, 958, 24 S.Ct. 640, 641;
The Kenilworth, 3 Cir., 144 F. 376, 377-8;
24 Ruling Case Law, 1167, 1168.

Means whereby an accident could have been avoided can always be suggested after the occurrence thereof, and a process of reasoning backwards indulged in.

Captain Forsyth had to accept conditions as they were told him at the time. On the scanty information which he received for the first time at 3 o'clock in the morning, it was not unreasonable for him to suppose that Brashear was just another alcoholic whom his shipmates and drinking companions were best able to take care of. An uncertain trip on dark waters to distant parts at midnight surely offered great dangers to one in that condition. Rest and the companionship of his shipmates until morning offered a far more reasonable solution. There was no threat of violence or jumping overboard reported to him. When the record is attentively examined the conclusion is inevitable that the master exercised a reasonable judgment. The majority opinion exacts something more. It is therefore manifest that the majority opinion has inadvertently misconceived the law.

CONCLUSION.

For the several reasons herein appearing, it is therefore respectfully submitted that a rehearing should be granted in the above entitled cause.

Dated, San Francisco,
July 14, 1939.

REDMAN, ALEXANDER & BACON,
JAMES M. WALLACE,
HERBERT CHAMBERLIN,
Proctors for Appellee and Petitioner.

Certificate of Counsel.

The undersigned, counsel and proctor for appellee in the above entitled cause, hereby certifies that in his judgment the foregoing Petition for Rehearing is well grounded, in both law and fact, and that it is not interposed for delay.

Dated, San Francisco,
July 14, 1939.

Jewel Alexander,
Of Counsel for Appellee and Petitioner.

No.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

DORIS BARKSCHAT,

Appellant,

vs.

FRANK M. CHICHESTER, Trustee in Bankruptcy,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Parker & Baird Company, Law Printers, Los Angeles.

No.

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DORIS BARKSCHAT,

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italics; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

PAGE

Statement of Evidence (Continued) PAGE

Names and Addresses of Solicitors.

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Los Angeles, California.

For Appellee:

IGNATIUS F. PARKER, Esq.,

354 South Spring Street,
Los Angeles, California.

UNITED STATES OF AMERICA, ss.

To FRANK M. CHICHESTER, Trustee in Bankruptcy, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 30th day of March, A. D. 1938, pursuant to an order allowing appeal filed on March 1st, 1938, in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain cause No. 29,974-C, In Bankruptcy, Central Division, wherein DORIS BARKSCHAT is appellant and you are appellee to show cause, if any there be, why the decree, order or judgment in the said appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable GEO. COSGRAVE United States District Judge for the Southern District of California, this 1st day of MARCH, A. D. 1938, and of the Independence of the United States, the one hundred and sixty-second.

Geo. Cosgrave
U. S. District Judge for the Southern District of California

Service of a copy of the foregoing Citation is acknowledged this 1st day of March, 1938

Ignatius F. Parker
Attorney for Appellee

[Endorsed]: Filed R. S. Zimmerman, Clerk, at 41 min past 12 o'clock Mar. 1, 1938 P. M. By M. J. Sommer, Deputy Clerk.

DEBTOR'S PETITION

Form 1

TO THE HONORABLE Judge of the
District Court of the United States for the
Southern DISTRICT OF California

Central Division

THE PETITION OF Henry Barkschat,
(Name in Full)
of 348 So. Elm Drive Street Beverly Hills,
(Residence Number) (City)
in the County of Los Angeles Southern District
and State of California and by occupation a Manager of American Safety Products Corp. RESPECTFULLY REPRESENTS: That he has resided, had domicile and principal place of business for the greater portion of six months next immediately preceding the filing of this petition, at Beverly Hills within said judicial district; that he owes debts which he unable to pay in full; that he is willing to surrender all his property for the benefit of his creditors; except such as is exempt by law, and *desire* to obtain the benefit of the Act of Congress relating to bankruptcy;

That the Schedule hereto annexed, marked "A" and verified by your petitioner's oath, contains a full and true statement of all debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said Acts;

That the Schedule hereto annexed marked "B", and verified by your petitioner's oath, contains an accurate

inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said Acts.

WHEREFORE, your petitioner prays that he may be adjudged by the Court to be bankrupt within the purview of said Acts.

LeRoy Reames
Attorney for Petitioner

Henry Barkschat
Petitioner

OATH TO PETITION

United States of America)
Southern District of California)
Central Division) SS.
State of California)
County of Los Angeles)

I, Henry Barkschat, the petitioning debtor mentioned and described in the foregoing petition, hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

Henry Barkschat
Petitioner

SUBSCRIBED AND SWORN to before me this)
29th day of May 1937)

[Seal] Don Lake

Notary Public in and for the County of Los Angeles, State of California

[Endorsed]: Filed R. S. Zimmerman, Clerk at 45 min. past 12 o'clock, Jun. 2, 1937 p.m.; by F. Betz, Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE CENTRAL DIVISION, SOUTHERN DISTRICT OF CALIFORNIA

IN THE MATTER OF	
	No. 29974-C
HENRY BARKSCHAT	
	IN BANKRUPTCY.
BANKRUPT.	

At LOS ANGELES, in said District, on the 2nd day of June, A. D. 1937, before the Honorable GEO. COSGRAVE Judge of said Court in Bankruptcy, the petition of HENRY BARKSCHAT that HE be adjudged a bankrupt, within the true intent and meaning of the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said HENRY BARKSCHAT is hereby declared and adjudged a bankrupt accordingly.

IT IS THEREFORE ORDERED, That said matter be referred to SAMUEL W. McNABB, ESQ. one of the Referees in Bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said HENRY BARKSCHAT shall attend before said Referee on the 9th day of June, at LOS ANGELES and thenceforth shall submit to such orders as may be made by said Referee or by this Court relating to said voluntary bankruptcy.

WITNESS the Honorable GEO. COSGRAVE, Judge of the said Court, and the seal thereof, at LOS ANGELES in said District, on the 2nd day of June, A. D. 1937.

[Seal of the Court]

R. S. ZIMMERMAN
Clerk.
By M. R. Winchell
Deputy Clerk.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 25 min. past 4 o'clock Jun. 2, 1937 p.m.; by M. R. Winchell, Deputy Clerk

[TITLE OF DISTRICT COURT AND CAUSE.]

PETITION FOR TURN-OVER ORDER AGAINST BANKRUPT AND HIS WIFE.

TO THE HONORABLE SAMUEL W. McNABB, REFEREE IN BANKRUPTCY:

Comes now, FRANK M. CHICHESTER, Trustee in Bankruptcy of the above entitled matter and respectfully represents,

That he is the duly appointed, qualified and acting Trustee in the above entitled matter.

That in the course of the p*or*ceedings of bankruptcy in the above entitled matter examination has been had of several witnesses under Section 21-a of the Bankruptcy Act, including the bankrupt and his wife; that from said examination it appears that on or about April 8, 1937, the sum of $11,500.00 was paid over at the direction of one William Barber to the wife of the above named bankrupt.

That your petitioner is informed and believes and therefore alleges that said money belongs to the above entitled estate; that the said transfer thereof at the direction of the bankrupt was in fraud of the creditors herein; that said wife of the bankrupt has no right or title to said funds or any thereof and that she and the bankrupt herein should be required by this court to account to the Trustee herein for the said funds and be required to turn same over to the trustee in this matter.

WHEREFORE, your petitioner prays that an order to show cause may be issued herein directed to Henry Barkschat the bankrupt herein, and to his wife Doris Barkschat, requiring them to be and appear before the above

entitled court in it's court room, Room 601, H. W. Hellman Building, 354 South Spring Street, Los Angeles, California, on Monday, September 27, 1937, then and there to show cause, if any they have, why they and each of them should not be required to account to the court for the said sum of $11,500.00, received by them or either of them through or from one William Barber and why they and each of them should not be restrained by this court from disposing or transferring of any property or assets of any kind belonging to them or either of them until a full accounting is made to this court in this matter.

DATED: September 21, 1937.

Frank M. Chichester
FRANK M. CHICHESTER, Trustee.

Ignatius F. Parker
IGNATIUS F. PARKER,
Attorney for Trustee.

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss.

FRANK M. CHICHESTER, being first duly sworn deposes and says: that he is the Trustee in the above entitled matter, that he has read the foregoing PETITION FOR TURN-OVER ORDER AGAINST BANKRUPT AND HIS WIFE, and knows the contents thereof; that same is true of his own knowledge except as to those matters therein stated upon his information and belief and such matters as he believes it to be true.

Frank M. Chichester

Subscribed and sworn to before me this 21st day of September, 1937.

[Seal] M. E. Marsh
Notary Public in and for said County and State.
My Commission Expires June 15, 1941

[Endorsed]: Filed R. S. Zimmerman, Clerk at 52 min. past 4 o'clock Oct. 26, 1937 P. M. By M. R. Winchell, Deputy Clerk.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE RE TURN-OVER ORDER TO BANKRUPT AND HIS WIFE.

On the verified petition of the Trustee herein, no adverse interest appearing and good cause appearing therefor,

IT IS ORDERED that the bankrupt herein, Henry Barkschat, and his wife, Doris Barkschat, and each of them be and appear before the above entitled court on Monday, September 27, 1937, at 2 P. M., at the court room of said court, Room 601 H. W. Hellman Building, 354 South Spring Street, Los Angeles, California, then and there to show cause, if any they have, why they and each of them should not be required to turn over to the trustee herein as an asset of this estate the sum of $11,500.00 received by or through William Barbar; and why they and each of them should not be restrained from disposing of any of their assets or property until an accounting is made to this estate and to the Trustee thereof of the said funds received from or through said William Barber.

DATED: September 21st, 1937.

Hugh L Dickson
REFEREE IN BANKRUPTCY.

[Endorsed]: Filed R. S. Zimmerman, Clerk, at 52 min. past 4 o'clock Oct. 26, 1937 p.m.; by M. R. Winchell Deputy Clerk

[Title of District Court and Cause.]

OBJECTIONS AND DEMURRER RE: PETITION AND ORDER TO SHOW CAUSE RE TURNOVER.

Comes now DORIS BARKSCHAT, and appearing specially for the purpose of demurring and objecting to the summary jurisdiction of the above entitled court in re that certain "Order to Show Cause re Turnover" made by Hugh L. Dixon, Referee in Bankruptcy, under date of September 21, 1937, in the above entitled matter, and that certain petition for "Turn-over Order Against Bankrupt and His Wife," filed in the above entitled matter by Frank M. Chichester, Trustee, and for grounds of objection and demurrer thereto alleges as follows:

I.

That the above entitled Court has no jurisdiction of the subject matter of these proceedings, or of her, the said Doris Barkschat's, claim thereto, or of her, the said Doris Barkschat.

II.

That the petition of the Trustee in Bankruptcy herein does not state facts sufficient to constitute a cause of action.

III.

That the petition of the Trustee in Bankruptcy herein does not state facts sufficient to constitute a cause of action for an order requiring the said Doris Barkschat to turn over to the said Trustee said sum of $11,500.00, received by or through said William Barber, as alleged in said petition, or any other sum; that said petition of said Trustee in Bankruptcy does not state facts sufficient to

constitute a cause of action for an order restraining said Doris Barkschat from disposing of any of her assets or property until an accounting is made to said estate and to said Trustee of the said funds received from or through said William Barber, as prayed for in said petition.

IV.

That the above entitled Court has no jurisdiction in this summary proceeding to hear, determine or adjudicate any of the issues raised by said petition or said Order to Show Cause without the consent of said Doris Barkschat, and which consent is hereby expressly withheld.

Dated this 24th day of September, 1937.

REX B. GOODCELL and
MANLEY C. DAVIDSON
By Manley C. Davidson
Attorneys for Doris Barkschat

We, Rex B. Goodcell and Manley C. Davidson, do hereby certify that the foregoing objections and demurrer are made in good faith and not for the purpose of delay, and that in our opinion the points therein stated are well taken in law.

Rex B. Goodcell
Manley C. Davidson

[Endorsed]: Received copy of the within Demurrer & Objections this 27th day of Sept. 1937 Ignatius F. Parker, Attorney for Trustee Filed Sep. 27, 1937 at 2 o'clock P. M. Samuel W. McNabb Referee, M. E. Marsh, Clerk. Filed R. S. Zimmerman Clerk at 52 min. past 4 o'clock Oct. 26, 1937 P. M. By M. R. Winchell, Deputy Clerk.

[Title of District Court and Cause.]

ANSWER AND OBJECTIONS OF DORIS BARKSCHAT RE PETITION AND ORDER TO SHOW CAUSE RE TURNOVER.

Comes now DORIS BARKSCHAT, and appearing specially and solely for the purpose of objecting to the summary jurisdiction of the above entitled Court, and in answer to that certain "Order to Show Cause re Turnover Order to Bankrupt and his Wife," made by Hugh L. Dixon, Referee in Bankruptcy, under date of September 21, 1937, in said above entitled matter, and in answer to that certain "Petition for Turnover Order Against Bankrupt and his Wife," filed in the above entitled matter by Frank M. Chichester, Trustee, and respectfully shows, protests and objects, as follows:

I.

That she is not a party to the above entitled matter.

II.

That it appears from said petition of the Trustee herein that said sum of $11,500.00, as alleged in said petition, was paid over to said Doris Barkschat on or about April 8, 1937, and that the same was paid to her prior to the filing of the petition in bankruptcy by the bankrupt herein.

III.

That the sum of $11,500.00 was not paid to her, as alleged in said petition of said Trustee herein, but in truth and in fact the sum of $11,250.00 was paid over to her on or about said April 8, 1937, at the direction of said

William Barber, and that ever since said 8th day of April, 1937, she, the said Doris Barkschat, has been, and now is, the owner of the same; that said Doris Barkschat claims to be, and is, the sole owner of, and entitled to the possession of, said sum of $11,250.00, and that she holds the same adverse to said bankrupt, to said bankrupt estate, and to said Trustee herein.

IV.

That the possession of said sum of money prayed for in said petition of said Trustee, and mentioned in said Order to Show Cause, either actual or constructive, was not in said bankrupt, said Trustee in Bankruptcy, nor the above entitled Court, at the time of the filing of the petition in bankruptcy by the bankrupt herein, nor at any time subsequent thereto, nor at the time of the filing of the petition by the Trustee herein; that neither said bankrupt, nor said Trustee in Bankruptcy, nor the above entitled Court, nor any of them, have ever been in the possession, either actual or constructive, of said sum of money, or any part thereof;

That the actual possession, and the right thereto, of said sum of money, to-wit: $11,250.00, was in said Doris Barkschat on said 8th day of April, 1937, and at the time of the filing of the petition in bankruptcy herein by said bankrupt, and at all times mentioned herein the same has been her individual property.

V.

That said sum of $11,250.00 was paid to said Doris Barkschat by said Hoge, under direction of said William

Barber, as aforesaid, as the individual, sole and separate property of said Doris Barkschat, and was acquired and held in good faith by her; that said Henry Barkschat was not, at the time of said payment, nor at any time was he, nor is he now, the owner of, or in any way interested in, or entitled to receive any part of said sum of $11,250.00, nor is the estate of said Henry Barkschat, bankrupt, now, nor ever was the owner of all, or any part of, said sum of $11,250.00.

VI.

That she, the said Doris Barkschat, may not be compelled to submit, without her consent, which is hereby expressly withheld, to the summary jurisdiction of the above entitled court in the above entitled proceeding.

VII.

That the above entitled court is without jurisdiction to hear, determine or adjudicate, in a summary proceeding, the questions of law and fact involved, as raised by said petition of said Trustee in Bankruptcy herein, and said Order to Show Cause, without the consent of said Doris Barkschat, which is expressly withheld herein.

VIII.

In answer to said petition of said trustee, said Doris Barkschat denies each and every allegation therein, commencing on page 1 thereof, line 23, beginning with the words "that your petitioner" and ending on line 30, page 1, ending with the words "in this matter.".

IX.

That the record discloses, by and through the examination under Section 21a of one Fulton W. Hoge, Attorney at Law representing said William Barber, and which said testimony was taken before this Court, in said above entitled matter, on August 30, 1937, that so far as said attorney knew, "Mr. Barkschat had no financial interest in the matter", referring to said sum of $11,500.00; that payment was made of said sum to said Doris Barks*hc*at, as being the sum of $11,250.00, instead of $11,500.00, upon the written instructions of said Barber; that said Fulton W. Hoge, prior to and at the time of said payment of said moneys to said Doris Barkschat, as aforesaid, had never heard of any agreement between said Henry Barkschat, said bankrupt, whereby said bankrupt, either directly or indirectly, was to participate in the said payment made by said Hoge to said Doris Barkschat.

Wherefore, said Doris Barkschat respectfully prays:

(1) That the prayer of said petition be denied;

(2) That said petition and said Order to Show Cause be dismissed; and

(3) For such other and further order in the premises as shall be meet and proper.

Doris Barkschat
DORIS BARKSCHAT

Rex B. Goodcell
Manley C. Davidson
Attys for Doris Barkschat

STATE OF CALIFORNIA, }
} ss.
COUNTY OF LOS ANGELES. }

DORIS BARKSCHAT being by me first duly sworn, deposes and says that *he* is the Respondent in the above entitled action; that *he* has heard read the foregoing Answer and Objections of Doris Barkschat re Petition and Order to Show Cause re Turnover and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon her information or belief, and as to those matters that she believes it to be true.

Doris Barkschat

Subscribed and sworn to before me this 27th day of September A. D., 1937.

[Seal] Frank L Simons

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Received copy of the within Answer and Objections this 27th day of September 1937 Ignatius F. Parker Attorney for Trustee Filed Sep. 27, 1937 at 2 o'clock P. M. Samuel W. McNabb Referee, M. E. Marsh, Clerk. Filed R. S. Zimmerman, Clerk at 52 min. past 4 o'clock Oct. 26, 1937 P. M. By M. R. Winchell, Deputy Clerk.

[Title of District Court and Cause.]

TURN-OVER ORDER AND RESTRAINING ORDER AGAINST HENRY BARKSCHAT, BANKRUPT, AND DORIS BARKSCHAT, HIS WIFE.

The petition of the trustee herein against Henry Barkschat, the bankrupt in this proceeding, and against his wife Doris Barkschat, for a turn-over order, and the order to show cause heretofore entered herein on said petition having come on for hearing before the court on Monday, September 27, 1937, and again on Wednesday, September 29, 1937, the trustee herein, Frank M. Chichester, appearing in person and by his attorney Ignatius F. Parker, Esq., the bankrupt appearing in person and by his attorney LeRoy Reames, Esq., and said Doris Barkschat appearing in person and by her attorneys Rex B. Goodcell and Manley C. Davidson, Esqs., and Objections and Demurrer Re: Petition and Order to Show Cause Re Turnover Order, together with Answer and Objections of Doris Barkschat Re Petition and Order to Show Cause Re Turnover Order having been filed herein at the first hearing in this matter on September 27, 1937, by said Doris Barkschat and it appearing therefrom that said Doris Barkschat objected to the jurisdiction of this bankruptcy court to proceed summarily in this matter to require said Doris Barkschat to account for and turn over to the trustee herein as an asset in this estate the sum of $11,250.00 received by said Doris Barkschat and claimed by the trustee herein as an asset of this estate and the court having considered said objections to the summary jurisdiction of this court and evidence both oral and documentary having been introduced herein by the trustee and by the said respondents, the bankrupt and his wife, and the court having considered same;

The court finds that on or about April 8, 1937, Doris Barkschat received $11,250.00 through one William Barber and one Charles V. Hatter; that said money belonged to and was the property of the bankrupt herein Henry Barkschat by reason of an agreement dated December 2, 1932, between the said Henry Barkschat, William Barber and Charles V. Hatter; that said money was turned over to said Doris Barkschat as an agent of and for the account of the bankrupt herein Henry Barkschat; that at the time of the filing of the petition in bankruptcy in this matter on June 2, 1937, the said Doris Barkschat held said sum of $11,250.00 as agent of the bankrupt herein Henry Barkschat and for his benefit and not as her sole and separate property; that at the time of said adjudication herein the control of and right of possession to said $11,-250.00 was in the bankrupt herein Henry Barkschat; that the claim of said Doris Barkschat to ownership of said funds at the time of adjudication herein is merely colorable, a mere pretense and without any legal justification; that the transfer of said funds to Doris Barkschat was without any consideration from Doris Barkschat and was a fraud upon the creditors of this estate and said transfer was made for the purpose of concealing said funds from the then existing creditors of the bankrupt herein.

That based upon said findings and the record in this proceeding the objections and demurrer of the respondent Doris Barkschat re petition and order to show cause re turnover are overruled and denied and the objection of said respondent Doris Barkschat to the jurisdiction of this court to proceed by summary proceedings to require said Doris Barkschat to turn over and account to the Trustee herein for the said $11,250.00, is overruled and denied and the court hereby expressly finds that this court has

summary jurisdiction to order the said respondent, Doris Barkschat, to turn over and account to the trustee herein for the said funds;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the bankrupt herein Henry Barkschat and his wife Doris Barkschat turn over to the trustee herein forthwith the sum of $11,250.00 received by said Doris Barkschat as agent for and for the account of the bankrupt herein Henry Barkschat on or about April 8, 1937.

IT IS FURTHER ORDERED that the said bankrupt herein Henry Barkschat and his wife Doris Barkschat be and they and each of them hereby are enjoined and restrained from transferring, assigning or turning over to any person whatsoever other than the trustee in bankruptcy in this proceeding any portion of the said $11,250.00 now in their possession and control, or in the possession and control of either of them and further enjoined from transferring, assigning or otherwise disposing of any property of any kind in their possession or control, or in the possession or control of either of them, which may have been acquired by, through or with any of the said sum of $11,250.00, to anyone other than the trustee herein.

DATED: October 6th, 1937.

Hugh L. Dickson
REFEREE IN BANKRUPTCY.

[Endorsed]: Receiver copy of order herein 10-5-37. LeRoy Reames, atty for bankrupt Received copy of Order herein. Manley C. Davidson. Filed R. S. Zimmerman Clerk at 52 min past 4 o'clock, Oct 26, 1937, p.m. By M. R. Winchell, Deputy Clerk.

[Title of District Court and Cause.]

PETITION OF DORIS BARKSCHAT FOR REVIEW OF REFEREE'S ORDER

Comes now DORIS BARKSCHAT, and petitions the court for the review of an order made and entered on the 6th day of October, 1937, by the Honorable Hugh L. Dickson, Referee in Bankruptcy, in the above entitled matter;

That on or about the 21st day of September, 1937, Frank M. Chichester, Trustee in the above entitled matter, filed in the above entitled matter his Petition for Turn-Over Order against Bankrupt and his Wife, your petitioner herein, Doris Barkschat, and that upon said petition the Honorable Hugh L. Dickson, Referee in Bankruptcy, under date of September 21, 1937, made and issued his Order to Show Cause Re Turn-over Order to bankrupt and his wife, the same being your petitioner herein, Doris Barkschat; that in response to said Order to Show Cause, your petitioner did specially appear in said proceedings and file her Objections and Demurrer re Petition and Order to Show Cause Re Turn-Over", and did specially appear before said Referee and file her Answer and Objections of Doris Barkschat re Petition and Order to Show Cause re Turnover;

That upon the hearing thereof, the Honorable Hugh L. Dickson, Referee in Bankruptcy, made and entered his order on the 6th day of October, 1937, as follows, to-wit:

"That the bankrupt herein Henry Barks*h*cat and his wife Doris Barkschat turn over to the trustee herein forthwith the sum of $11,250.00 received by said Doris Barkschat as agent for and for the account of the bankrupt herein Henry Barkschat on or about April 8, 1937.

"IT IS FURTHER ORDERED that the said bankrupt herein Henry Barkschat and his wife Doris Barkschat be and they and each of them hereby are enjoined and restrained from transferring, assigning or turning over to any person whatsoever other than the trustee in bankruptcy in this proceeding any portion of the said $11,250.00 now in their possession and control, or in the possession and control of either of them and further enjoined from transferring, assigning or otherwise disposing of any property of any kind in their possession or control, or in the possession or control of either of them, which may have been acquired by, through or with any of the said sum of $11,250.00, to anyone other than the trustee herein."

to which order petitioner duly excepted.

That such order was and is erroneous, in that:

(1) The Referee had no jurisdiction to hear, determine or adjudicate the matters contained in said order in a summary proceeding, over the objections of this petitioner;

(2) That the Referee erred in overruling and denying the objections and demurrer of petitioner, Doris Barkschat, re Petition and Order to Show Cause Re Turnover;

(3) That the Referee erred in over-ruling and denying the objections of your petitioner, Doris Barkschat, to the jurisdiction of this court to proceed by summary proceedings to require said Doris Barkschat to turn over and account to the Trustee herein for the said sum of $11,250.00;

(4) That the Referee erred in finding that this Court has summary jurisdiction to order your petitioner, Doris

Barkschat, to turn over and account to the Trustee herein for said funds;

(5) That the Referee erred in making his finding:

That said money belonged to and was the property of the bankrupt herein Henry Barkschat by reason of an agreement dated December 2, 1932, between the said Henry Barkschat, William Barber and Charles V. Hatter;

That said money was turned over to said Doris Barkschat as an agent of and for the account of the bankrupt herein, Henry Barkschat;

That at the time of the filing of the petition in bankruptcy in this matter on June 2, 1937, the said Doris Barkschat held said sum of $11,250.00 as agent of the bankrupt herein Henry Barkschat and for his benefit and not as her sole and separate property;

That at the time of said adjudication herein the control of and right of possession to said $11,250.00 was in the bankrupt herein Henry Barkschat; that the claim of said Doris Barkschat to ownership of said funds at the time of adjudication herein is merely colorable, a mere pretense and without any legal justification; that the transfer of said funds to Doris Barkschat was without any consideration from Doris Barkschat and was a fraud upon the creditors of this estate and said transfer was made for the purpose of concealing said funds from the then existing creditors of the bankrupt herein.

WHEREFORE, your petitioner, feeling aggrieved because of such order, prays that said order may be re-

viewed and reversed, and declared null and void, as provided by the Bankruptcy Act of 1898, and General Order XXVII, and that she be restored to all things she has lost by reason of said error.

Doris Barkschat
Petitioner on Review

REX B. GOODCELL and
MANLEY C. DAVIDSON
By Manley C. Davidson
Attorneys for Petitioner

STATE OF CALIFORNIA,)
COUNTY OF LOS ANGELES.) ss.

Doris Barkschat being by me first duly sworn, deposes and says that she is the petitioner in the within Petition for Review of Referee's Order in the above entitled action; that she has heard read the foregoing petition and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon her information or belief, and as to those matters that she believes it to be true.

Doris Barkschat

Subscribed and sworn to before me this 13th day of October A. D., 1937.

[Seal] Frank L. Simons
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Oct. 13, 1937 at 3 o'clock P. M. Samuel W. McNabb, Referee. By M. E. Marsh, Clerk. Filed R. S. Zimmerman, Clerk at 52 min. past 4 o'clock, Oct. 26, 1937 P. M. By M. R. Winchell, Deputy Clerk

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON PETITION FOR REVIEW.

TO THE HON. GEO. COSGRAVE, JUDGE OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION:

I, HUGH L. DICKSON, one of the Referees in Bankruptcy of the above entitled Court, do hereby certify to the following:

Doris Barkschat, the wife of the above named bankrupt, has duly filed her petition for review from an order made by your Referee requiring said Doris Barkschat and her husband, Henry Barkschat, the bankrupt herein, to turn over to the trustee in this proceeding the sum of $11,250.00. The order complained of was made after a hearing on a verified petition of the trustee in bankruptcy in this matter for a turn-over order against the bankrupt herein and his said wife, Doris Barkschat, and upon an order to show cause issued herein pursuant to the prayer of said verified petition of the trustee for said turn-over order. The said trustee's petition for a turn-over order against the bankrupt and his wife herein was filed in this proceeding on September 21, 1937, and an order to show cause was issued by your Referee upon said verified petition on September 21, 1937, requiring the said bankrupt and his said wife, Doris Barkschat, to be and appear before your Referee herein on September 27, 1937, to show cause why the said turn-over order sought by the trustee in this matter should not be granted. On said September 27, 1937, the said petition and order to show cause came on for hearing before your Referee, the trustee appearing

in person and by his attorney, Ignatius F. Parker, Esq., the bankrupt appearing in person and by his attorney, LeRoy Reames, Esq., and Doris Barkschat, the wife of the bankrupt herein, appearing in person and by her attorneys, Rex B. Goodcell and Manley C. Davidson, Esqs., at which time said Doris Barkschat, through her attorneys, filed in this matter two certain documents, namely, "Objections and Demurrer Re: Petition and Order to Show Cause Re Turnover" and "Answer and Objections of Doris Barkschat Re Petition and Order to Show Cause Re Turnover", asserting that said Doris Barkschat appeared especially and solely for the purpose of objecting to the summary jurisdiction of the above entitled Court in this matter as to said Doris Barkschat, asserting that said Doris Barkschat was an adverse claimant of the money in the amount of $11,250.00 as to which the trustee herein sought a turnover order, and by reason of her asserted adverse claim to said money, in the amount of $11,250, was entitled to have her rights thereto adjudicated in a plenary action.

Thereupon, the trustee herein contended that said Doris Barkschat's claim to ownership of said money was merely colorable, a mere pretense and without any legal justification, and requested that the Referee proceed to determine whether or not said Doris Barkschat was in fact an adverse claimant and entitled to have her rights determined in a plenary action or whether her adverse claim was merely colorable, a mere pretense and without any legal justification as asserted by the trustee herein.

Evidence both oral and documentary was introduced by the trustee in support of his said petition for a turn-over

order and in support of his said contention that the alleged adverse claim of the respondent, Doris Barkschat, was merely colorable, a mere pretense and without any legal justification, and evidence both oral and documentary was introduced by the respondents herein, Henry Barkschat and Doris Barkschat, his wife, in opposition thereto, said respondent Doris Barkschat specifying that by introducing evidence in this matter she did not wish it understood that she was consenting to the jurisdiction of this Court or waiving her objections to this proceeding. At the conclusion of said hearing on Monday, September 27, 1937, the matter was continued for further hearing to Wednesday, September 29, 1937, at which time further evidence, both oral and documentary, was presented by the said parties hereto. The matter was then argued by respective counsel for the parties hereto and thereupon your Referee announced that in his opinion there was at the time of adjudication in this proceeding constructive possession in the bankrupt and consequently constructive possession in the trustee of the said money for which the trustee sought a turn-over order; that this Court had summary jurisdiction to enter its turn-over order in this matter, and that the order would be that said money be turned over to the trustee upon the ground that manifestly it was the money of the bankrupt, Henry Barkschat. Accordingly, there was entered on October 6, 1937, a turn-over order and restraining order against Henry Barkschat, bankrupt, and Doris Barkschat, his wife, containing the findings of fact and conclusion of your Referee in this matter, which is the order complained of in the petition of said Doris Barkschat for review of Referee's order, and which order is attached hereto and made a part hereof and forwarded with this, your Referee's certificate on petition for review.

THE QUESTIONS PRESENTED.

The questions presented by this review are:

A. Was your Referee correct in holding that under the facts in this case on the evidence presented herein, this Court had jurisdiction summarily to require the respondent, Doris Barkschat, to turn over to the trustee herein the sum of $11,250.00, the subject of the said turn-over order on review herein?

B. Was your Referee correct in holding under the evidence that the right to said money and constructive possession of the said sum of $11,250.00 was in the bankrupt herein and consequently in the trustee in this proceeding at the time of the filing of the petition in bankruptcy in this matter?

There are no other questions involved herein, as the validity of the order under review herein depends entirely upon the correctness of the Referee's conclusion from the evidence presented in this matter that the right to said money and constructive possession of the said sum of $11,250.00 claimed by the trustee in this proceeding was in the bankrupt at the time of adjudication and consequently in the trustee in bankruptcy in this matter. The answer of the respondent, Doris Barkschat, filed in this proceeding alleges that the actual possession of the said sum of $11,250.00 was in said Doris Barkschat at the time of the filing of the petition in bankruptcy herein by said bankrupt and there can be, therefore, no question either as to the amount involved, or the Trustee's right thereto if there was constructive possession thereof in the bankrupt at the time of adjudication.

The petition of the trustee for the turn-over order involved herein alleges that on or about April 8, 1937, the sum of $11,500.00 was paid over to the wife of the above named bankrupt, Doris Barkschat; that she had no right or title to said funds or any thereof; that said money belongs to this bankrupt estate and that she and the bankrupt herein should be required to account to the trustee herein for the said funds and be required to turn same over to the trustee in this matter.

The respondent, Doris Barkschat, appeared specially, and objected to the jurisdiction of the Court, and answering the petition of the trustee alleges that the sum of $11,500.00 was not paid to her, but that the sum of $11,-250.00 was paid to her on or about April 8, 1937; that she is the owner thereof and entitled to the possession of said sum of $11,250.00, and that she holds the same adverse to the said bankrupt, to the said bankrupt estate and to the said trustee herein, and she objects to the jurisdiction of this Court summarily to require her to account for and pay over to the trustee the said sum of $11,250.00.

Your Referee proceeded to take testimony as above stated to determine whether or not this Court has summary jurisdiction in the matter, and determining that constructive possession of said money was in the bankrupt at the time of adjudication, concluded that this Court did have summary jurisdiction and on the same evidence ordered the said bankrupt herein and his wife to turn over forthwith to the trustee in this proceeding the said sum of $11,250.00.

SUMMARY OF THE EVIDENCE.

Testimony was introduced in this proceeding on behalf of the trustee by Henry Barkschat and Charles V. Hatter, who were called as witnesses by the trustee, and documentary evidence was presented by the trustee, consisting of trustee's exhibits numbered 1 to 4, inclusive. Testimony was also presented by respondent, Henry Barkschat, and on behalf of the respondent, Doris Barkschat, by said Henry Barkschat, Doris Barkschat herself and William Ellery Barber as witnesses for the respondent, and documentary evidence consisting of respondent's Exhibits A and B were introduced on behalf of the respondent Doris Barkschat without, however, waiving her objection to the jurisdiction of the Court in this proceeding.

Summarized, the said evidence consisted of the following:

On or about December 2, 1932, the bankrupt herein, Henry Barkschat, together with one Charles V. Hatter, entered into a contract of employment with one William Ellery Barber, under the terms of which the said William Ellery Barber employed the said Henry Barkschat, the bankrupt herein, and said Charles V. Hatter to assist him in establishing his paternity, in return for which services said Barber agreed to pay to the bankrupt herein and Hatter one-fourth of anything he should recover, unless he was mentioned in the will of his reputed father, in which case the said bankrupt and Hatter were to receive one-eighth of whatever Barber recovered. Services were rendered by the bankrupt herein and said Charles V. Hatter, pursuant to the terms of said contract. (Trustee's Exhibit 1.)

Later, and on or about December 7, 1933, another agreement was executed by and between the said William Ellery Barber and said Charles V. Hatter, under the terms of which William Ellery Barber agreed to pay to said Charles V. Hatter a sum equal to one-fourth of all property coming to said William Ellery Barber from the estate of Edward L. Doheny, in consideration of services to be performed by said Charles V. Hatter for said Barber, with the exception, that in the event Barber was remembered in the will of Edward L. Doheny, Hatter was to get one-eighth instead of one-fourth of whatever property Barber should receive by reason of said will. (Respondent's Exhibit A)

Still later, and under date of March 23, 1936, another agreement was entered into between William Ellery Barber and Charles V. Hatter, whereby, in consideration, among other things, of the cancellation of the contract of December 7, 1933, (Respondent's Exhibit A) William Ellery Barber assigned to Charles V. Hatter, "Twenty-two and one-half per cent (22½%) of all my right, title and interest, both legal and equitable, in and to the estate of my father, Edward L. Doheny, deceased, who died on the eighth day of September, 1935", including twenty-two and one-half per cent of any money received by said Barber. (Trustee's Exhibit 2.)

The bankrupt herein, Henry Barkschat, was not mentioned in either of the last two mentioned contracts, namely Respondent's Exhibit A, and Trustee's Exhibit 2. Charles V. Hatter testified, however, that it was agreed and at all times understood between himself and Henry Barkschat that Henry Barkschat, the bankrupt herein, was to receive one-half of whatever Hatter got under the terms of the last two mentioned contracts, Respondent's

Exhibit A and Trustee's Exhibit 2. That the contract of December 2, 1932, (Trustee's Exhibit 1) had never been cancelled, but had only been modified as to percentage, and Hatter always understood that Henry Barkschat, the bankrupt herein, was to get one-half of whatever Hatter received under said contract. [Tr. p. 42]

On or about April 8, 1937, a settlement was effected on behalf of William Barber, whereby the sum of $100,000.00 was paid over to the attorneys for said William Barber, who in turn directed payments of certain portions of said $100,000.00 to other parties in accordance with agreements previously executed by said William Berber. (Respondent's Exhibit B).

On or about April 8, 1937, Charles V. Hatter executed an assignment to Doris Barkschat of 50% of his interest in the estate of Edward L. Doheny, deceased, acquired by him by the assignment from William Ellery Barber. (Trustee's Exhibit 3.)

Charles V. Hatter testified that he received $11,250.00 as his interest in said settlement under the terms of the contract of December 2, 1932, (Trustee's Exhibit 1) as modified and reduced in percentage by the contract of March 26, 1936 (Trustee's Exhibit 2), that said sum was all he, Hatter, was entitled to, in accordance with his understanding with Henry Barkschat, and the remaining one-half of the 22½% of the $100,000.00 payment belonged to Henry Barkschat; that at the time of the said payment and settlement there was prepared for him to execute an assignment of 50% of his interest in the matter to Doris Barkschat, (Trustee's Exhibit 3); that he understood that said disposition of Henry Barkschat's interest in the 22½% was satisfactory to everybody con-

cerned; that he, Charles V. Hatter, only claimed to be entitled to one-half of the 22½% and he was not concerned with what became of the remaining one-half of said percentage, which he always recognized as belonging to Henry Barkschat.

Charles V. Hatter further testified that no consideration whatever was paid him by Doris Barkschat for the execution of said assignment dated March 29, 1937 (Trustee's Exhibit 3), and that he did not ever have the aid of said Doris Barkschat in any effort to establish the paternity of William Barber, and that he did not ever have any business relations with Doris Barkschat [Tr. p. 45], but Henry Barkschat worked on the matter. [Tr. p. 116 and 125].

Charles V. Hatter further testified that two or three weeks prior to the hearing in this matter, Henry Barkschat, the bankrupt herein, called at Hatter's office and told Hatter "to destroy any of those documents" if he found any [Tr. p. 46]; that it would mean poverty for the Barkschats if the papers were in existence. [Tr. p. 48]; that Henry Barkschat told Hatter on the very morning of the hearing in this matter [Tr. p. 50] to destroy those documents, and that "if this first paper was in existence that he would be absolutely broke, he wouldn't have anything." [Tr. p. 51]

Henry Barkschat first testified that he never had any contract or agreement with William Barber, whereby he, Henry Barkschat, was to get anything for the assistance he rendered William Barber in establishing the latter's paternity claims, but he later testified [Tr. p. 21] that he thought he ought to have something, that he told Mr. Hatter he felt that way and asked Hatter to split his

percentage with him, which Hatter consented to do, but it was never reduced to writing; that he told William Barber he, Henry Barkschat, expected to get one-half of Hatter's interest. Barber then said he didn't think Henry Barkschat should have anything because he was a relative and he, William Barber, wanted to give Doris Barkschat something for letting him live in her house and helping him; that he, Henry Barkschat, then went to Hatter and told him, "to assign this stuff to Mrs. Barkschat, any interest that should have been mine." When confronted with the contract of December 2, 1932, the Trustee's Exhibit 1, Henry Barkschat testified that in the beginning there may be some agreements to which his name is a part, he didn't remember, but when it came to 1934, there was no agreement between Mr. Barber and himself [Tr. p. 27], but he later testified that as late as 1936 and 1937, he, Henry Barkschat, expected one-half of Hatter's interest and that in the early part of 1937 he told Mr. Hatter that William Barber didn't want him, Henry Barkschat, to have it and he, Henry Barkschat, asked Hatter to transfer it to his wife, Doris Barkschat.

Henry Barkschat further testified that he had never discussed the contents of Trustee's Exhibit 3 with his wife, Doris Barkschat, prior to the time the money was delievered to her; that she wanted to know why she received it and that he told her that Barber took the stand that he, Henry Barkschat, was not entitled to anything, that Barber wanted Doris Barkschat to have the money; and he, Henry Barkschat, told Hatter to transfer the money to Doris Barkschat. Mrs. Barkschat testified that she did not know that Hatter was going to assign one-half of his percentage to her, she didn't know anything about it, she didn't know anything about any contracts

[Tr. p. 74, L. 7]; that she got this money, $11,250.00, on or about April 8, 1937, and that she based her claim of ownership upon the fact that she took care of Mr. Barber, supported him and gave him money and kept a house over his head, and that it was his wish that she have it, but she never had any agreement with William Barber that he was to give her anything whatsoever—it was understood; that she didn't have any idea why Charles V. Hatter assigned one-half of 22½% to her rather than a quarter or three-quarters of his entire percentage. [Tr. p. 77, L. 19-23]

William Barber testified that when he learned that Henry Barkschat still had a half interest in the Hatter contract he didn't think he deserved it; that Barber promised Doris Barkschat something if he won the case; that if Henry Barkschat had anything coming he should give it to her; that he told Doris Barkschat that he would see that she got something; that from 1934 up to the present he was employed on WPA projects; that during the last two years he had stayed at the home of Henry Barkschat and Doris Barkschat all together approximately seven months out of two years time; that Doris Barkschat had given him money from time to time during the last two years, but the amount she had given him all together would not amount to $1,000.00; that he, William Barber, did not give Doris Barkschat any of the money that he got out of the settlement. [Tr. P. 98, L. 15-17]

A transcript of the entire testimony taken in this proceeding is being forwarded with this certificate for the information of the Court on this review.

CONCLUSIONS FROM THE EVIDENCE.

From the evidence presented to your Referee in this matter it appeared to your Referee that there was no dispute as to the facts in this case and no conflict of evidence. The witness, Henry Barkschat, the bankrupt herein, at first denied any contract with William Barber, but upon being confronted with Trustee's Exhibit 1, admitted that at all times involved herein he claimed the right to one-half of whatever Charles Hatter was entitled to under any settlement of William Barber's claims and that because William Barber said he didn't want Henry Barkschat to have any of the money he, Henry Barkschat, instructed Hatter to transfer his, Henry Barkschat's, share of the money to Doris Barkschat, the wife of the bankrupt, but said Henry Barkschat did not testify that he gave said money to his wife, Doris Barkschat. The witness Hatter testified that he always recognized that Henry Barkschat was entitled to one-half of the share of the settlement in which Hatter was interested. Doris Barkschat didn't know why this money was paid to her, and William Barber specifically testified that he never gave Doris Barkschat any of the money that he got out of the settlement.

From these facts, there was no other conclusion the Referee could draw but that this money involved belonged to the bankrupt, Henry Barkschat, and was turned over to his wife at his request, as a matter of convenience, to accept the most favorable view of the testimony, and as testified to by the bankrupt and his wife, because of William Barber's statements that he thought Henry Barkschat wasn't entitled to it. But Henry Barkschat didn't testify that he wasn't entitled to the money but rather that he at all times expected it in case a settlement was

made. Furthermore, the records in this bankruptcy proceeding disclose and the schedules in bankruptcy herein show that at the time of said transfer the bankrupt was heavily in debt to his creditors.

There was no controversy in the matter of law involved in this proceeding except of course the contention that this Court did not have summary jurisdiction in the matter, and as to that your Referee, from the evidence herein, concluded that said money belonged to the bankrupt, was consequently in his constructive possession at the time of adjudication herein, and that this Court, therefore, has summary jurisdiction to order it turned over to the trustee.

FINDINGS OF FACT.

Based upon the foregoing conclusions, your Referee made the following findings of fact in this matter, as set forth in the turn-over order of October 6th, 1937, upon review herein, which are as follows:

The Court finds that on or about April 8, 1937, Doris Barkschat received $11,250.00 through one William Barber and one Charles V. Hatter; that said money belonged to and was the property of the bankrupt herein, Henry Barkschat, by reason of an agreement dated December 2, 1932, between the said Henry Barkschat, William Barber and Charles V. Hatter; that said money was turned over to said Doris Barkschat as an agent of and for the account of the bankrupt herein, Henry Barkschat; that at the time of the filing of the petition in bankruptcy in this matter on June 2, 1937, the said Doris Barkschat held said sum of $11,250.00 as agent of the bankrupt herein, Henry

Barkschat, and for his benefit and not as her sole and separate property; that at the time of said adjudication herein the control of and right of possession to said $11,250.00 was in the bankrupt herein, Henry Barkschat; that the claim of said Doris Barkschat to ownership of said funds at the time of adjudication herein is merely colorable, a mere pretense and without any legal justification; that the transfer of said funds to Doris Barkschat was without any consideration from Doris Barkschat and was a fraud upon the creditors of this estate and said transfer was made for the purpose of concealing said funds from the then existing creditors of the bankrupt herein.

CONCLUSIONS OF LAW.

The conclusions of law from the foregoing facts, found by your Referee in this matter, are set up in the said turnover order as follows:

That based upon the said findings and the record in this proceeding, the objections and demurrer of the respondent Doris Barkschat re petition and order to show cause re turnover are overruled and denied and the objection of said respondent Doris Barkschat to the jurisdiction of this Court to proceed by summary proceedings to require said Doris Barkschat to turn over and account to the Trustee herein for the said $11,250.00, is overruled and denied, and the Court hereby expressly finds that this Court has summary jurisdiction to order the said respondent, Doris Barkschat, to turn over and account to the trustee herein for the said funds.

TURN-OVER ORDER.

Based upon the foregoing findings of fact and conclusions of law, your Referee made his order in this matter under date of October 6th, 1937, as follows:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the bankrupt herein Henry Barkschat and his wife Doris Barkschat turn over to the trustee herein forthwith the sum of $11,250.00 received by said Doris Barkschat as agent for and for the account of the bankrupt herein Henry Barkschat on or about April 8, 1937.

IT IS FURTHER ORDERED that the said bankrupt herein Henry Barkschat and his wife Doris Barkschat be and they and each of them hereby are enjoined and restrained from transferring, assigning or turning over to any person whatsoever other than the trustee in bankruptcy in this proceeding any portion of the said $11,250.00 now in their possession and control, or in the possession and control of either of them and further enjoined from transferring, assigning or otherwise disposing of any property of any kind in their possession or control, or in the possession or control of either of them, which may have been acquired by, through, or with any of the said sum of $11,250.00, to anyone other than the trustee herein.

PAPERS SUBMITTED.

I hand out for the information of the Court the following documents:

(1) Trustee's Petition for Turn-over Order Against Bankrupt and his Wife. Dated September 21, 1937.

(2) Order to Show Cause Re Turn-over Order to Bankrupt and His Wife. Dated September 21, 1937.

(3) Objections and Demurrer Re: Petition and Order to Show Cause Re Turnover. Filed herein September 27, 1937.

(4) Answer and Objections of Doris Barkschat Re Petition and Order to Show Cause Re Turnover. Filed September 27, 1937.

(5) Trustee's Exhibits, one to four, inclusive.

(6) Respondent's Exhibits, A and B.

(7) Transcript of testimony and proceedings on hearing of said order to show cause.

(8) Turn-over Order and Restraining Order Against Henry Barkschat, Bankrupt, and Doris Barkschat, his Wife. October 6, 1937.

(9) Petition of Doris Barkschat for Review of Referee's Order. Filed October 13, 1937.

(10) Request That Certain Documents Be Attached to Certificate on Review.

Respectfully submitted this 26th day of October, 1937.

Hugh L. Dickson
Referee in Bankruptcy.

[Endorsed]: Filed R. S. Zimmerman Clerk at 52 min. past 4 o'clock, Oct. 26, 1937 P. M. By M. R. Winchell, Deputy Clerk.

At a stated term, to-wit: The September Term, A. D. 1937, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday the 3rd day of February, in the year of our Lord one thousand nine hundred and thirty-eight.

Present:

The Honorable GEO. COSGRAVE District Judge.

In the Matter of	)	
	)	
HENRY BARKSCHAT,	)	No. 29,974-C.
	)	
Bankrupt.	)	

This matter having come before the Court on November 15, 1937, for hearing on petition of Doris Barkschat for review of order of the referee requiring Doris Barkschat and her husband, Henry Barkschat, the Bankrupt, to turn over to the trustee the sum of $11,250.00 pursuant to notice of hearing filed October 29, 1937, and having been argued by counsel and submitted on briefs to be filed 10 x 5, and briefs having been filed and duly considered by the Court, upon consideration thereof the Court now orders as follows:

The money in question was at all times the property of the bankrupt, and its purported transfer to Doris Bark-

schat was palpably a pretended transfer only. Her claim of ownership had no substantial basis whatever. Viewing the situation even as urged by the petitioner, it, nevertheless, follows that the consideration for the transfer of the money to the petitioner was board, lodging, and etc., furnished by the petitioner, which, with the possible exception of some cash, was community property.

It seems to me, therefore, that it is "so unsubstantial and obviously insufficient, either in fact or law, as to be plainly without color of merit and a mere pretense," within the meaning expressed in Harrison vs. Chamberlin, 271 U. S. 191, 195, and that the findings and conclusions of the referee must be sustained. It is so ordered.

Exception to the petitioner.

[Title of District Court and Cause.]

NOTICE OF LODGMENT OF STATEMENT OF EVIDENCE AND ASSIGNMENT OF ERRORS.

TO FRANK M. CHICHESTER, TRUSTEE IN BANKRUPTCY HEREIN, AND IGNATIUS F. PARKER, ESQUIRE, HIS ATTORNEY:

You, and each of you, will please take notice that the appellant, Doris Barkschat, appealing from the order made and entered on February 3, 1938, by the above entitled Court sustaining the findings and conclusions of the Referee, and in effect denying the petition for review of Referee's Order and affirming and approving said Referee's Order, did on the 1st day of March, 1938, file and lodge in the Office of the Clerk of the above entitled Court, a statement of evidence, and that on the 14th day of March, 1938, at the hour of 12:00 M. noon, on said day at the Chambers of the Honorable Geo. Cosgrave, Judge of the above entitled Court, the undersigned will ask the Honorable Geo. Cosgrave, Judge of the above entitled Court, to approve said statement of evidence.

You, and each of you, will also please take notice that appellant, Doris Barkschat, on March 1st, 1938, filed in the office of the Clerk of the above entitled Court, her Assignment of Errors, copy of which is herewith served upon you.

Dated this the 1st day of March, 1938.

Rex B. Goodcell,
Manley C. Davidson,
Attorneys for Appellant.

Service of the foregoing Notice of Lodgment of Statement of Evidence and Assignment of Errors, and service of the Assignment of Errors mentioned in said foregoing Notice, and the receipt of copy of said documents is hereby acknowledged, together with a copy of the Statement of Evidence.

This 1st day of March, 1938.

Ignatius F. Parker,
Attorney for Appellee.

[Endorsed]: Filed R. S. Zimmerman Clerk at 40 min. past 12 o'clock, Mar. 1, 1938 p.m. By M. J. Sommer, Deputy Clerk.

[Title of District Court and Cause.]

AMENDED STATEMENT OF EVIDENCE

In Re: APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT, BY DORIS BARKSCHAT, FROM AN ORDER MADE AND ENTERED ON FEBRUARY, 3, 1938, SUSTAINING THE FINDINGS AND CONCLUSIONS OF THE REFEREE AND IN EFFECT AFFIRMING TURNOVER ORDER AND RESTRAINING ORDER AGAINST HENRY BARKSCHAT, BANKRUPT, AND DORIS BARKSCHAT, his wife.

The following is a statement of the evidence in narrative form in the above entitled cause.

The hearing on the petition for Turnover Order against Bankrupt and his wife, of Frank M. Chichester, Trustee in Bankruptcy in the above entitled matter, and the Order to Show Cause issued pursuant thereto, began on the 27th day of September, 1937, before Hugh L. Dickson, Referee, and was thereafter continued from said date to the 29th day of September, 1937, I. F. Parker, Esquire, appearing as attorney for said Trustee, Rex S. Goodcell and Manley C. Davidson, Esquires, appearing as attorneys for Doris Barkschat, the respondent in said proceeding and the appellant herein, and LeRoy Reames, Esquire, appearing for the bankrupt herein; and

It appearing that said Henry Barkschat, bankrupt, filed a petition in bankruptcy on the 2nd day of June, 1937, and on said day, by order of said District Court

of the United States, made and entered, he was adjudged a bankrupt, and concurrently therewith an order was made referring all matters therein to Samuel W. McNabb, Referee in Bankruptcy, and that in the absence of said Samuel W. McNabb, Referee, the above proceedings were referred to Hugh L. Dickson, Referee in Bankruptcy, and the following proceedings were had:

STATEMENT BY MR. GOODCELL:

I want to file on behalf of Doris Barkschat written objections and a demurrer to the petition and order to show cause and an answer and objections to the petition and order to show cause.

Whereupon, the said documents were permitted by said Referee to be filed in the above matter.

MR. PARKER: When the question of jurisdiction, if your Honor please, refers to a summary proceeding, as appears to be raised by these two documents just filed here today, it becomes incumbent upon the Court to determine whether or not it has jurisdiction. I therefore, in view of that objection, request permission of the Court to proceed to show to the Court by evidence which I will present, that this Court does have jurisdiction, and any claim of title to this property by or on behalf of Doris Barkschat is merely colorable, and if that is established, then we will have satisfied the requirement to show jurisdiction of this Court . . . . . we wish to proceed then to meet the objection to the jurisdiction.

Whereupon respective counsel argued to the Court the right of the Court to proceed to determine whether or not the Court had jurisdiction to proceed further by

this summary proceeding in view of the alleged verified adverse claim of the respondent, Doris Barkschat, asserted in her objections and answer.

Whereupon respective counsel argued to the Court the issues raised by the said Objections and Demurrer to said Trustee's Petition for a Turnover Order and the said Order to Show Cause, and thereupon the Referee made his ruling overruling said Objections and Demurrer, and the Objections of said Doris Barkschat to the jurisdiction of said Referee and said Court over her person, and over the subject matter of her claim to the moneys in a summary proceeding, without her consent, which was expressly withheld, to which ruling counsel for said Doris Barkschat noted an exception.

"THE REFEREE: As I understand your situation, you want now to conduct a preliminary examination to ascertain whether or not the bankruptcy Court acquired or had jurisdiction by reason of the constructive or actual possession?

"MR. PARKER: Yes. We wish to ask the Court to determine now whether or not this asserted adverse claim on the part of the respondent Doris Barkschat is a true adverse claim or whether it is merely colorable . . . . . That is what we are asking.

"THE REFEREE: Well, that is what we are going to do gentlemen. I overrule the objection.

"MR. DAVIDSON: We will take an exception to the ruling.

"THE REFEREE: . . . . . My impression, gentlemen, is that the Referee has the right to take testimony to ascertain whether or not the claim to

(Testimony of Henry Barkschat)

the funds which it is alleged belong in the estate, — whether that claim is substantial or merely colorable. Now we will take testimony up to that point.

"MR. DAVIDSON: Isn't the first question to be determined whether or not the Court had jurisdiction by reason of possession?

"THE REFEREE: Yes, either actual or constructive. It might be constructive. If it should develop that this lady held for some other person or for the bankrupt it would be constructive possession. We will proceed on that theory and see how far we get. You may call your first witness.

(Testimony of Henry Barkschat)

HENRY BARKSCHAT,

Witness for Trustee, was sworn and testified as follows:

DIRECT EXAMINATION

I live at 348 South Elm Drive, Beverly Hills. Mr. Reames is my attorney. I have read a certified copy of the reporter's transcript of an examination on August 19, 1937, wherein as the bankrupt herein I was asked certain questions by the attorney for the trustee on the 21-a examination. I testified as therein stated.

(At this point there was read into the record by Mr. Parker the following testimony previously given by the witness, Henry Barkschat, under 21-a examination, which is stated herein in narrative form.)

(Testimony of Henry Barkschat)

"Q. What does William Barber do, —what is his business?"

A. "William Barber doesn't have anything. He is mining in Nevada now. He is an oil and mining man. I did not ever have, and do not now have, any interest with Mr. Barber, nor ever been interested in any of his mining deals. I never had any kind of an agreement or contract with him at all about anything. I recently went with Mr. Barber to a firm of attorneys, Williamson, Ramsay and Hogue. I have been there many times. I went with him because he wanted to establish his paternity and his rights. There was some settlement made in that connection through which Mr. Barber was paid a large amount of money. I had no interest whatsoever in that, and was not to receive something from Mr. Barber, not a cent—not a penny, in consideration for my assistance to him in that matter. I didn't receive one cent from him. There was no understanding or agreement between him and me that I was to receive anything. He told me he has been paid a settlement, which was accomplished early in the year 1937. The attorneys did not represent me in the matter. They represented William Barber, and any testimony that they may give in this matter is all right with me.

"I have no interest in the William Barber matter. I did not enter into any agreement with William Barber by which I was to profit in any way in a recovery in which William Barber might recover in the matter of establishing his paternity—not a cent, not a penny. I do not contemplate getting anything in connection with it. 'I told him it is yours, you are on your way.' I understand the reason you are asking me that; if I

had an agreement or understanding with him by which I was to profit by that negotiation or transaction my estate would claim the right to that. I have no agreement nor did I receive one dollar, not a cent." (End of testimony read from previous 21-a examination.)

CROSS-EXAMINATION

Mr. Barber was a nephew of my first wife—not my present wife, Doris Barkschat—and my connection with his claim was that of a relative trying to obtain a settlement for him. There was some question as to who was William Barber's father, and he wanted to establish that and to obtain a part of his father's estate, and a settlement was made out of court. My former wife was a sister of the first wife of Edward L. Doheny, and she insisted that something be done to take care of William Barber. He lived with us for quite a number of years in my home and we looked after him. William Barber's father was Edward L. Doheny, and he was born out of wedlock. Doheny did not want Barber near him. I have been in the family for some twenty years and I consequently knew the family secret. My former wife, some time in 1930, took William Barber to Mr. Hatter, who was an old friend of the family, formerly connected with Pinkertons.

In September, of 1934, William Barber told me who his attorneys were, and I told him they were too young, so I took him to Williamson, Ramsay and Hogue. At that time Mr. Doheny was dead, and Mr. Barber was not mentioned in his will. I went to Mr. Barber's other attorneys, by the name of Massay & Edgington,

and told them they would have to join with the firm of attorneys. There had been understandings before this, but at this particular time all agreements were cancelled. All agreements which Mr. Barber had made before were cancelled and new agreements were made up.

Now, then in these agreements, I had spoken with Mr. Hatter—I believed that I was entitled to something out of this and I told Mr. Hatter I felt this way and asked him, since he thought he would need more help one way or another, if he wouldn't split his percentage with me. Mr. Hatter agreed to do so, but it was never reduced to writing, — it was verbal.

Then later on, William Barber was at my house, and I disclosed to him later on, I don't know what date, that I expected to get one-half of Mr. Hatter's interest, and he told me, —"Henry," he says, "I don't think you are entitled to anything. You are a relative of mine and you should not have anything and I want to, —I want to give Doris something for letting me live in her house and helping me, and you are not entitled to anything." I then went to Mr. Hatter and told him to assign this stuff to Mrs. Barkschat, any interest that should have been mine, and which he refused to let me have, and Mr. Hatter did so. That is the only interest which I have had with Mr. Barber and that is the only interest which I tried to get. To be frank with you, I tried to get some money out of it, —no use my denying it, but he felt I was not entitled to it. William Barber is peculiar that way.

William Barber is now in Los Angeles, he lives in our house. He is of the western type that will tell you

outright what they think and what they will do and what they won't do, and as a consequence I gave my interest up, I got nothing. I did that because William Barber told me I was not entitled to anything, but that he did want to compensate my wife for kindnesses and other things other than the service I performed. That is the situation, William Barber lived in the home with me and my wife some two or three years before the settlement was made and he was perfectly penniless during all of that time; he had nothing. I was practically broke too. This answering Doris Barkschat supplied the home and the money and the living that William Barber had over that period of two or three years. Well, he was with us. At times he would go out and disappear, then he would come back. He had a predilection to the overindulgence of intoxicating liquors. My wife kept him in the home and looked after him. I did not disclose to Doris Barkschat, my wife, my understanding with Mr. Hatter at all, nor the probability or possibility of my realizing something out of the settlement that William Barber might make.

"Q. Did you or did you not acquiesce in the suggestion of William Barber that you, being in the family, should not get anything?

A. That was his stand. That was the stand he took toward me."

There was nothing in writing between me and Mr. Hatter that I know of. I told Mr. Hatter that all my interest should go over to my wife, because William Barber wished it so, because he wanted to show his appreciation of what she had done for him. At that

(Testimony of Henry Barkschat—Charles V. Hatter)

time I did not contemplate going into bankruptcy. I have never had possession of that money, or any part of it. I have never deposited it in my name anywhere, nor drawn a check against any part of it. I never considered that money, or any part of it, as mine.

I do not have any agreement that when the bankruptcy matters are concluded that Doris Barkschat will turn over to me or deliver to me any part of this money. Doris Barkschat was not employed during the period William Barber lived in our home or at any other time to my knowledge. I was not supplying the funds for the necessary household expenses but Mrs. Barkschat did from her own money, her own income, I was not earning anything. This house was not mine; she owns it and acquired it before her marriage to me with her own funds.

(Testimony of Charles V. Hatter)

CHARLES V. HATTER,

Witness for Trustee, was sworn and testified as follows:

DIRECT EXAMINATION

I appeared here today in response to a subpoena and have brought with me certain documents pertaining to the business and affairs of the bankrupt.

(At this point while documents were being shown counsel for the bankrupt, the Referee requested further testimony from Henry Barkschat)

(Testimony of Henry Barkschat)

HENRY BARKSCHAT,

Resuming testimony stated:

"Q. BY THE REFEREE: In seeking to establish William Barber's claim to any part of the Ed Doheny estate, what were you to do, —testify as to your knowledge of his birth and who his parents were, and so forth?

A. BY MR. BARKSCHAT: Yes, give such information as I possessed.

Q. If it became necessary you would supply such information?

A. Yes, sir.

Q. Concerning his birth and parentage as was in your knowledge?

A. Yes, sir.

Q. BY MR. PARKER: And you also did establish, you testified here just a few minutes ago, —you also assisted him in attempting to establish his paternity through obtaining attorneys and legal advice and investigating?

A. No. I just took him to one group of attorneys, is all.

Q. You took him to Williamson, Ramsay & Hogue and went there several times with him?

A. I went there many times."

(Testimony of Henry Barkschat)

There is one thing more I wanted to say. In the beginning, when this thing was going on many agreements were signed by Mr. Barber. As a general rule he was under the influence of liquor, and many agreements were signed. Now in the beginning there may be some agreements in which my name is a part—I don't know—I don't remember; that goes years back. But when it came to the settlement, —I mean when it came to 1934, there was no agreement between Mr. Barber and myself, I have no record as to that.

The settlement was made in 1937, but he had complained that I was not entitled to anything, not once but a number of times, and therefore I did not include myself in any agreement after all the original agreements were abrogated. Now in the original agreements here, —under the former agreements, —I was in the original agreement, years ago, because I tried to get some of that money; I don't hesitate telling you that; but when the final agreements were drawn I was not in it and I didn't get a part of it. I do not have any of those alleged final agreements because I was not in any. The only agreements I had were verbal agreements between Mr. Hatter and myself.

(Testimony of Charles V. Hatter)

CHARLES V. HATTER,

Resuming testimony, on direct examination, stated:

Since I was served with subpoena to come in and testify in this matter I have had conversation with the bankrupt, Henry Barkschat, occasionally. I had a conversation with him today. He called me and wanted to know whether I had been served or not and whether I was to be coming up here, and he came up to my office, just he and I were present. I don't recall all that we were talking about. We were talking about the agreement and that I would have to testify and things like that. He wanted to know if I had the agreements and I told him I would look for them and I would phone him if I found them. I don't recall much more that Mr. Barkschat said to me.

This conversation took place today. He asked me about the contracts or agreements that we had had and whether I had them or not, and I told him I would look for them; I would phone him. He told me if there was no agreement in existence—I told him I didn't know where my papers were, that I had to go and look them up and if I found them I would see what I would have anyway. That is just about the extent of the conversation then.

The document which I produced which you show me dated December 2, 1932, contains my signature. I know Henry Barkschat's signature. That is his signature on that document. I know William Elery Barber's signature. That is his signature. All those signatures were sworn to and subscribed to this document before the Notary. I saw all of these men sign this agreement.

(Testimony of Charles V. Hatter)

Thereupon, there was offered and received in evidence, as Trustee's Exhibit "1", a contract of employment in words and figures as follows:

"This agreement entered into in triplicate this 2nd day of December, 1932, between William Elery Doheny, generally known as William Elery Barber, at present of Los Angeles, California, party of the first part, and Charles V. Hatter and Henry Barkschat, of Los Angeles, California, parties of the second part, WITNESSETH:

It is agreed by and between the parties hereto as follows:

1.—Party of the first part hereby employs the parties of the second part as investigators and detectives to gather information necessary to prove that said party of the first part is the son of one Edward L. Doheny, of Los Angeles, California, and that the parties of the second part assist the Attorney or Attorneys at Law in the preparation of a contest of the will of said Edward L. Doheny, or/and in the settling out of court or any claim or claims made by the party of the first part through his Attorney or Attorneys.

2.—That the party of the first part agrees to pay said parties of the second part for their services a sum equal to one-fourth of all money or/and property recovered by the party of the first part either through compromise settlement out of court or contest of said will.

(Testimony of Charles V. Hatter)

3.—And it is further agreed by the party of the first part that should the party of the first part be adequately remembered in the will of the said Edward L. Doheny, the parties of the second part receive as compensation for services rendered a sum equal to one-eighth of all moneys or/and property so received by the party of the first part.

4.—Second parties agree to undertake the employment for the compensation named and make all necessary investigations and procure the necessary proof and documents for this purpose at their own cost and expense."

(Signed) William Elery Barber,
Party of the First Part.
Charles V. Hatter,
Henry Barkschat,
Parties of the Second Part."

(Endorsed on the bottom of the document)

"Subscribed and sworn to before me this 3rd day of December, 1932.

(Signed) A. Eguia de Moran,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires August 16, 1933."

(NOTARIAL SEAL)

(Testimony of Charles V. Hatter)

The Witness Continues:

Under the terms of that contract I received some compensation in the early part of this year. The compensation that I received was 11½ per cent of the money that was paid. One hundred thousand dollars was paid, and I got 11½ per cent of $100,000.00 That was $11,500.00. Under the terms of this contract I was to get one-fourth. It would not be $25,000.00. It would have been $22,500.00.

That other document, executed March 23, 1936, which I have produced here contains the signature of William Elery Barber. That document was between myself and Mr. Barber. It became effective originally, —the percentage had been divided and when, then, Mr. Barkschat entered into this contract, Mr. Ramsay decided that their office ought to receive 28 percent, and Mr. Massey's office was to receive 17½ percent, and my interest would be cut down to 22½ percent. Now that is this agreement, —my own agreement.

"Q. BY THE REFEREE: That is your agreement with whom?

A. That is my agreement with Barber which was drawn up in Mr. Ramsay's office. That is the 22½ percent.

Q. BY MR. PARKER: Was there ever any agreement in writing or orally, changing the terms of this agreement of December 2nd, 1932?

A. That is the one that changes the agreement of 1932, owing to the employment of additional Attorneys."

(Testimony of Charles V. Hatter)

Thereupon, there was offered and received in evidence, as Trustee's Exhibit No. 2, a document in words and figures, as follows:

"GRANT AND ASSIGNMENT

KNOW ALL MEN, that I, WILLIAM ELERY BARBER, also known as WILLIAM ELERY DOHENY, residing in the County of Los Angeles, State of California, herein called the "Assignor", in consideration of the sum of Ten Dollars ($10.00), receipt of which is hereby acknowledged, and in consideration of the cancellation of that certain contract executed on the 7th day of December, 1933, by and between myself and Lloyd R. Massey, and the cancellation of that certain contract executed on the 7th day of December, 1933, by and between myself and Charles V. Hatter, HEREBY GRANT, BARGAIN, SELL, ASSIGN, TRANSFER AND SET OVER TO CHARLES V. HATTER, with offices located at 257 South Spring Street, City of Los Angeles, California, his heirs and assigns, twenty-two and one-half per cent (22½%) of all my right, title and interest, both legal and equitable, in and to the estate of my father, Edward L. Doheny, deceased, who died on the 8th day of September, 1935, including twenty-two and one-half per cent (22½%) of the value of whatever sums of money or property or evidences of indebtedness or securities or other things of value which are, or may be, awarded to the assignor, his heirs or legal representatives, either by judgment or decree, or by virtue of any compromise or settlement with the estate of Edward L. Doheny, deceased,

(Testimony of Charles V. Hatter)

or any other person, or by virtue of the sale or any other disposition of assignor's interest or claim in said estate to any person whomsoever.

IN WITNESS WHEREOF, I have hereunto set my hand, in the City of Los Angeles, State of California, on the 23rd day of March, 1936.

(Signed) William Elery Barber

In the presence of:
Winifred Wishart (Signed)
Merl Laring (Signed)"

(Acknowledgment by William Elery Barber, under date of March 23, 1936, before Elsie W. Wyatt, Notary Public in and for Los Angeles County)

"AGREEMENT

In consideration of the within grant and assignment and other good and valuable considerations, the undersigned hereby acknowledge and agree to the cancellation and rescission of the agreements referred to in the within grant and assignment, namely:

1. That certain contract executed on the 7th day of December, 1933, by and between William Elery Barber and Lloyd R. Massey, and

2. That certain contract executed on the 7th day of December, 1933, by and between William Elery Barber and Charles V. Hatter.

Signed: Lloyd R. Massey
Lloyd R. Massey
Signed: Charles V. Hatter
Charles V. Hatter"

(Testimony of Charles V. Hatter)

(Acknowledgments by each said Lloyd R. Massey and Charles V. Hatter, under date of March 25, 1936, before Elsie W. Wyatt, Notary Public in and for Los Angeles County.)

At this point the Trustee offered in evidence an agreement dated December 6, 1933, to which offer an objection by the Respondents was sustained.

The witness continues:

That is my signature on the other document you show me. I executed it before a Notary Public, as that certificate there states, on the 29th day of March, 1933. I executed it in Mr. Ramsay's office, or Mr. Williamson's. I think Mr. Ramsay was then dead. I am not sure about that. In the office of Williamson, Ramsay and Hoge, because that is their notary.

Thereupon, there was offered and received in evidence, as Trustee's Exhibit "3", a document in words and figures as follows:

"A S S I G N M E N T

KNOW ALL MEN BY THESE PRESENTS, That I, CHARLES V. HATTER, in consideration of $10.00 in hand paid and of a good and valuable consideration, receipt of which is hereby acknowledged, do hereby sell, assign, transfer and set over to DORIS BARKSCHAT 50 per cent of all my right, title and interest, both legal and equitable, in and to the estate of Edward L. Doheny, deceased, who died on the 8th day of September, 1935, being 50 per cent of the interest in said estate

(Testimony of Charles V. Hatter)

heretofore acquired by me by assignment from William Elery Barber.

IN WITNESS WHEREOF, I have hereunto set my hand, in the City of Los Angeles, State of California, on the 29th day of March, 1937.

(Signed) Charles V. Hatter"

(Acknowledgment before Notary Public on March 29, 1937)

The witness continues:

There were no other agreements drawn up relating to the interest of Henry Barkschat; there are the only ones that were drawn and there is nothing in that from 1933 on, or after 1936.

"Q. Did you ever have any understanding or agreement with Henry Barkschat as to the disposition to be made of the moneys you were to receive under this contract, Trustee's Exhibit No. 1?

MR. GOODCELL: Which contract do you refer to?

MR. PARKER: Trustee's Exhibit No. 1, the contract of December 2, 1932.

MR. GOODCELL: We object to that as being incompetent and irrelevant, and that the Trustee's Exhibit No. 2 substitutes and nullifies and abrogates Trustee's Exhibit No. 1.

THE REFEREE: Overruled, and you may have an exception. You may answer the question.

(Question read by the reporter)

A. Well, not that I remember.

(Testimony of Charles V. Hatter)

Q. As far as you were concerned, then, Henry Barkschat was to get 50 percent of what you got under that contract, —is that correct?

MR. GOODCELL: That is objected to as calling for the conclusion of the witness.

THE REFEREE: Overruled. Note an exception.

A. Well, I knew—

Q. THE REFEREE: Now answer the question. Let's not evade, —let's get down to the truth. Did you have any understanding or agreement with Barkschat as to whether he was to get nothing out of this Doheny settlement or whether he was to get something? Give us the facts.

A. Well, he was to get half of what I got. That is all there is to it.

The witness continues:

I couldn't give you the exact date when I got the $11,500.00 at all that I received from William Barber or through that contract. It was this year. I think it was May, might have been June, or April. I could look that up and give you the exact date. This assignment, Trustee's Exhibit No. 2, dated March 29, 1937, does not have anything to do with the time when I received the $11,500.00. It was considered that this assignment was executed before I received the money. I couldn't answer how long before; I would have to look it up. It must have been paid over about that time or after that. I don't recall. I did not receive $10.00 for executing that assignment, Trustee's Exhibit No. 3, as stated therein.

(Testimony of Charles V. Hatter)

Under the terms of this document, Trustee's Exhibit No. 3, I did sell, assign, transfer and set over to Doris Barkschat fifty per cent of all my right, title and interest, both legal and equitable, in and to the estate of Edward L. Doheny, deceased, who died on the 8th day of September, 1935, being fifty per cent of the interest in said estate heretofore acquired by me by assignment from William Elery Barber. I complied with the terms of that agreement, of the assignment. I do not know whether or not Doris Barkschat received anything by reason of that assignment. The reason I executed that assignment—that was done in Mr. Ramsay's office—and I was to go and pay or put up or give up half of the 50 per cent, and as far as I was concerned it didn't matter who got it, —Mr. Williamson's office, the lawyer's office divided it all. They gave me my money. And paid Mrs. Barkschat the money.

I did not ever have the aid of Mrs. Barkschat in any effort to establish the paternity of young Doheny. I did not ever have any business relations with this woman. She did not ever come to my office and discuss the matter with me in any way, not that I can directly recall at any time. The only one that discussed matters with us was Mr. Barkschat.

Henry Barkschat called at my office recently. He asked me if I had been yet called. I don't recall. It might have been two or three weeks ago that he called at my office. More than that, I guess. He told me about his financial troubles, —that he was hard up and he was in bankruptcy, and just like that, —speaking of his affairs. At neither of those conversations, which I rec-

ently had with Henry Barkschat, did he tell me what, if anything, to do with any of these documents if I found them. Not that I recall at that time. I think he made the remark that he hoped there were none in existence.

"Q. (By Mr. Parker) Did he tell you what to do with any of them if you found any?

A. (The Witness) No, I don't know; you can assume a great deal if you wish to.

Q. I don't ask you to assume anything. I ask you to tell the Court now whether or not Henry Barkschat told you to destroy any of those documents if you found them?

A. Well - - - he did.

MR. PARKER: That is all.

Q. BY THE REFEREE: May I ask one question, Mr. Hatter, —I have known you for fifteen years. Why are you so reluctant to tell the truth? That is what I don't understand.

A. Well, I don't want to lie.

Q. Well, why don't you tell the truth, no matter who it helps or who it hurts?

A. I wouldn't tell any lies about it.

Q. Why, I have known you for fifteen years.

A. Yes, that is true, your Honor.

Q. I worked with you in the United States District Attorney's office, and I am surprised that you are reluctant to tell the truth, whatever it is, whoever it helps or whoever it hurts, —tell the truth. You are doing that now?

A. I am trying to.

(Testimony of Charles V. Hatter)

Q. And I may depend upon it that it is the truth, —that this man told you that if you found any such documents to destroy them, —is that the truth?

A. Yes, sir."

CROSS-EXAMINATION

"BY MR. REA*MS*:

Q. What did he say, do you recall?

A. I just mentioned that he said it would be well if they didn't exist, —they should be destroyed.

Q. He didn't tell you to do it, did he, Mr. Hatter?

A. Well, if that isn't telling a man to do it I wouldn't know how to express it.

Q. What did you say to him?

A. I didn't tell him that I had those papers or didn't have them.

Q. I don't want your conclusion. In your testimony you said he asked you if there was such a thing and you said you would look through your papers and find out.

A. Sure.

Q. And he says "Well, if they are there I wish they were destroyed, —is that it?

A. Practically so.

Q. In a jocular manner, or did he just say that,— "I want you to destroy those papers"?

A. Yes, sir.

Q. Or was it just said in a jocular manner?

A. Well, he told me that it would mean poverty for them, if the papers *ere* in existence.

Q. Would mean what?

A. Poverty. Do you know what poverty is?

(Testimony of Charles V. Hatter)

Q. I think so. One more question: You said you didn't care which way, or where, the money went; that half of whatever you earned,—you didn't care where it went. Is that right,—is that that your testimony?

A. Is what?

Q. You didn't care,—when the money was paid out you didn't care who got the fifty per cent?

A. It didn't mean anything to me; I had to give it to him.

Q. Did Mr. Barber then ask you to give it to Mrs. Barkschat or suggest anything,—Mr. William Barber?

A. He had nothing to do with that.

Q. Did he have anything to do, or to say anything about it?

A. Not that I know of.

Q. He was present?

A. Oh, yes, he was there.

Q. He never made any suggestions of any kind that you recall, Mr. Hatter?

A. Who did?

Q. Mr. Barber.

A. Not that I know of. In fact I was not asked any questions. They were there and the money was to be distributed and I had my share and that was the end of it.

MR. REA*MS*: That is all.

BY MR. GOODCELL:

Q. Where did this conversation take place with relation to the destruction of any documents which you might find?

A. In my own office.

(Testimony of Charles V. Hatter)

Q. And when?

A. Well, just a few days,—some days ago.

Q. Henry Barkschat didn't tell you flat-footedly to destroy those documents. Didn't he say he wished they had been destroyed?

A. You mean that I lie to you? I wouldn't lie on the stand for you or any other man.

Q. You don't know me at all and I haven't asked you to lie for me. I am trying to get the truth out of you.

A. Well, you are.

Q. Did Henry Barkschat ever tell you to destroy those documents?

A. Yes, sir.

Q. When?

A. The last time,—this morning.

Q. In your office?

A. In my office.

Q. Why didn't you testify to that awhile ago?

A. I testified to it.

Q. All right, Why didn't you testify to that on direct examination?

A. I am telling you the facts and that is all there is to it.

Q. May I have an answer to the question, as to why you evaded it in the first place and now come out with it so strong?

A. I didn't evade it at all.

MR. GOODCELL: I am asking the Court—

THE REFEREE: Well, he wants to know, Mr. Hatter, why you didn't tell frankly, in the beginning, that Barkschat told you this morning to destroy those

documents,—why didn't you come out with it then. Are you trying to protect Barkschat?

A. No, I don't want to protect anyone.

Q. BY THE REFEREE: Well, the fact remains, that you did not state in your direct examination that Barkschat told you this morning that he wanted you to destroy those documents. Now then, he wants to know why you didn't tell us that.

A. Well, I will tell you. I want to be frank about that too. He told me if this first paper was in existence that he would be absolutely broke, he wouldn't have anything. There was nothing more than just the feeling that a man may have for a woman,—thinking of other people too,—but the truth of it is the truth, that that is what did take place this morning.

THE REFEREE: Well, that is the answer.

Q. BY MR. REAMS: The fact does remain, Mr. Hatter, you did not destroy any paper that is in your possession?

A. Who did what?

Q. I say the fact is that you did not destroy any paper in your possession?

A. No, I did not.

Q. And you have produced and turned over to Mr. Parker or the Court all the papers or agreements that you have?

A. In my possession, yes, sir.

Q. BY MR. GOODCELL: Were there any other contracts in relation to this matter than Exhibits 1, 2 and 3?

(Testimony of Charles V. Hatter)

MR. PARKER: We offered this one and you didn't want it.

A. THE WITNESS: That is not one of them. Yes, that is one of them. That is all that I have.

Q. BY MR. GOODCELL: Did you have any others?

A. Not that I recall; not that I recall; not that I recall.

Q. Now there was some change made in the Exhibit 1, was there not?

A. What do you mean,—in the wording?

Q. No. It calls for 25 per cent, payable to you and Henry Barkschat.

A. That is correct.

Q. That is right. Now there was some change in that, wasn't there?

A. Yes, that is correct.

Q. Was that made in writing?

A. Yes, sir.

Q. The change was made in writing and is shown in Exhibit 2, isn't it?

A. Let me see what this is, first. Yes, sir.

Q. Then this Exhibit 2 really took the place of Exhibit No. 1?

A. As far as the percentage is concerned, yes.

Q. Exhibit No. 2 is dated the 23rd of March, 1936. Is there any reference therein to Henry Barkschat,—any possible interest he might have in the recovery of William Barber?

A. I didn't consider it necessary because we understood each other on this contract here, and that is all there was to it, and I have lived up to my contract.

(Testimony of Charles V. Hatter)

MR. GOODCELL: Read the question.

(Question read by the reporter)

A. No, there is none in this paper.

Q. By "this paper" you mean Exhibit 2?

A. Okay.

Q. Did Henry Barkschat ever in writing make any assignment of his interest in the contract, Exhibit 1, to you, or in writing ever authorize you to modify the terms of that contract?

A. No, not at all.

Q. And the contract upon which you proceeded to close this transaction is Exhibit 2, isn't it?

A. No. This one (indicating).

Q. Meaning Exhibit 1?

A. Yes, because that was the agreement that we entered into and that we was going to get. I was to give half to him and I was to get the other half and that agreement stood and remained."

The witness continues:

Trustee's Exhibit "3" was prepared in Mr. Ramsay's office. I did not have any conversation with Mrs. Barkschat regarding that exhibit that I know of. Henry Barkschat and I talked about it, before it was executed.

Q. Didn't Henry Barkschat tell you that William Barber, to whom he had defaulted the interest, that he, Henry Barkschat, was to receive half of your percentage,—objected to him Henry Barkschat, receiving any of it?

A. Well, he didn't receive any,—Barkschat.

(Testimony of Charles V. Hatter)

Q. Didn't he tell you that William Barber objected to him, Henry Barkschat, getting any of this 22½ percent?

A. Not that I know of .

Q. Never told you that?

A. No.

Q. Well, didn't he also tell you that William Barber wanted to remember or compensate Doris Barkschat because of her kindness to him?

A. That may be so, but it wasn't told me.

Q. Nobody told you that?

A. No.

Q. Did you ever talk to William Barber about Exhibit 3?

A. I had no reason therefor, and I didn't get to see him. He didn't come around to see me.

"MR. PARKER: I want to renew my offer to introduce in evidence this document of December 6, 1933, which appears to be the document referred to, or one of the documents referred to in Trustee's Exhibit 2,—for the further reason that I think all of these documents are inter-related and they all ought to be in evidence.

THE REFEREE: The same objection?

MR. GOODCELL: They cannot do any good and cannot do any harm.

THE REFEREE: I think I quite agree with the suggestion that all documents throwing any light on the transaction should be introduced in evidence, so that the District Judge on review may have the complete picture,—so it will be received and marked Trustee's Exhibit No. 4. Now you may proceed.

(Testimony of Charles V. Hatter)

There was offered and introduced in evidence, as Trustee's Exhibit No. "4", a document in words and figures as follows:

"AGREEMENT

"I, the undersigned WILLIAM ELERY DOHENY, also know as William Elery Barber, of Los Angeles, California, having this day executed a Power of Attorney in favor of LLOYD R. MASSEY, granting to said Lloyd R. Massey, as my lawful attorney-in-fact and attorney-at-law those certain powers, privileges and authority as in said Power of Attorney of even date herewith set forth and recited, all in connection with recovering for me any property to which I may be entitled from EDWARD L. DOWENY, my father, while living or from his estate, if any, after his demise, I hereby agree to pay to said Lloyd R. Massey a sum equal to one-fourth of in and to any and all my right, title and interest in and to the property, assets and estate of said Edward L. Doheny, my father, during his lifetime, and of his estate after his demise. This agreement applies to property of any character, no matter where situated.

IT IS DISTINCTLY UNDERSTOOD AND AGREED that said Lloyd R. Massey shall personally pay any and all expenses incident to the performing of the services in recovering for me an interest in the property of said Edward L. Doheny, my father, or from his estate after his demise. But is expressly understood that if anything is recovered for me, that then the costs expended by said Lloyd R. Massey are to be first deducted from my proportionate share.

(Testimony of Charles V. Hatter)

This contract is secured by a Power of Attorney of date December 6th, 1933.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 6th day of December, 1933.

(Signed) William Elery Barber
Witness: (Signed) Chas. V. Hatter.

I agree to the above.
(Signed) Lloyd R. Massey."

(Acknowledgment before Notary Public, Los Angeles County, on December 7, 1933, of proof by Charles V. Hatter that he was present and saw Mr. Barber execute the above instrument)

The Witness continues: (Questions by Mr. Reams)

When the question was asked me whether or not any mention was made by Mr. Barber about the paying of money to Mrs. Barkschat I said I didn't recall any such conversation or mention being made. That is correct. I do not. I wouldn't say that such statements were not made. I don't recall that.

"THE REFEREE: Now, Gentlemen, what next?

MR. PARKER: I think the answer filed here admits the payment on or about April 8, 1937, of $11,500.00 to the respondent Doris Barkschat.

MR. GOODCELL: That is not the correct amount. It is $11,250.00.

MR. PARKER: That is the only further fact I wish to produce in evidence here; I think it is admitted by the answer.

(Testimony of Charles V. Hatter)

THE REFEREE: Well, I don't see any use in admitting that in evidence if it is admitted in the answer.

MR. GOODCELL: It is admitted by the answer.

THE REFEREE: The answer says "in truth and in fact the sum of $11,250.00 was paid over to her on or about April 8, 1937, at the direction of said William Barber", so that would be taken as proof. Is that your case, Mr. Parker?

MR. PARKER: Just a moment, your Honor. I think that is as far as I should go at this time, having in mind that the only question before the Court at this time is whether or not there is jurisdiction in this Court to proceed summarily. I am prepared to make a statement to the Court unless there is further evidence to be presented.

THE REFEREE: Is there anything further, gentlemen? (No response). I am satisfied, gentlemen, from this evidence that there is jurisdiction.

MR. GOODCELL: If your Honor please, I think we should be given a chance to put some testimony in before your Honor rules.

THE REFEREE: Yes. I asked you and I understood you to say no.

MR. GOODCELL: No. I was looking over to Mr. Reams.

MR. REAMS: Are you through, Mr. Parker?

MR. PARKER: Yes.

MR. REAMS: I didn't hear you. I want to clear up a few points. Take the stand, Mr. Barkschat.

(Testimony of Henry Barkschat)

HENRY BARKSCHAT,

recalled as a witness in behalf of Respondent, having been previously sworn, was thereupon examined and testified as follows:

MR. PARKER: Now just a moment. As far as Mr. Reams is concerned, the interest of the bankrupt has nothing to do with the objection to the jurisdiction.

THE REFEREE: I think that is true, Mr. Reams. You represent this bankrupt. It is his duty and it is your duty as his attorney, to aid the Referee and the Trustee in uncovering and discovering and revealing any assets that belong to him.

MR. REAMS: No questions.

THE REFEREE: I think this contest here is strictly with the lady.

MR. REAMS: The only thing was, if Mr. Parker saw fit to bring out the conversation between Mr. Hatter and Mr. Barkschat—

THE REFEREE: Well, if you want Mr. Barkschat to testify on that I will permit him to do so.

MR. REAMS: That is the only thing.

THE REFEREE: All right.

Q. BY THE REFEREE: Tell us,—did you go to Hatter this morning and have a conversation with him?

A. I did, sir.

Q. Tell us the conversation.

A. I went to Mr. Hatter's office, like I am accustomed to drop in there at various times—

(Testimony of Henry Barkschat)

Q. Well, never mind that. Just tell us; you went there this morning,—and what did you say?

A. I told him that I was subpoenaed for this afternoon to go to the bankruptcy court, and I asked him if they also had subpoenaed him, because I expected that they would, and he says yes, they did on Saturday. I say "well, this is a serious situation for me", and I also told him that unless the real facts were brought out, that I was cut out in the first agreement, if it was ever found, that it would just ruin me, and I asked him if he still had that agreement, which should have been given to William Barber when the last agreement was made and that one should have been cancelled—and he said he didn't think he had it, but he would look it up and he would call me back at twelve o'clock, and since he didn't call me back at twelve o'clock I didn't go, because I figured that probably it was destroyed because it was worthless. The last agreement took the place of all others.

Q. Did you ask Mr. Hatter if he did find any such agreements to destroy them?

A. I did not. I say if I had it I would destroy it.

Q. Why would you destroy it?

A. Because it is worthless.

Q. Why destroy it; why not let the Referee see it?

A. The only thing of value in my mind is the last agreement. The rest of them are worthless and should not be floating around."

(Testimony of Henry Barkschat)

The Witness, Henry Barkschat, continues:

(Questions by Mr. Goodcell)

That is my signature on Exhibit "1". I have no copy of it. I did not ever have a copy of it; not that I recall. I made the arrangements with Messrs. Ramsay, Williamson & Hoge. I had a conversation with Mr. Hatter at that time as to the cancellation or abrogation of the contract Exhibit "1". That this was null and void. That the contracts were null and void. There were not any other contracts made in writing that I recall. Pardon me. Let me state this now: There have been many contracts made in the past, years ago, but I have no copies of them, so, therefore I cannot vouch for anything. There have been many, and whenever he was under the influence of liquor he would sign anything. I did see contracts executed after the abrogation of Exhibit "1". This one with Mr. Ramsey, Exhibit "2".

With relation to the execution of Exhibit "2", which is dated the 23rd day of March, 1936, I had the conversation with Mr. Hatter at that time, that particular time, relative to my prospective interest in the recovery for William Barber. I discussed the matter with Mr. Ramsey, who was going to draw up new contracts for all of us, and I told him, "Mr. Ramsey, you cannot include me because William Barber thinks I should not have it", and I told him it was all right with me, to leave me out, and I told Mr. Hatter at that time that I couldn't take any of that money because William Barber didn't want me to have any.

(Testimony of Henry Barkschat)

I know about the execution of this document, Exhibit "3", which is the assignment of the half interest of Mr. Hatter to Mrs. Barkschat. I was sitting in Mr. Ramsey's office and Mr. Hatter brought it in and handed it over to her. I had a discussion with Mr. Ramsey prior to the execution of Exhibit "3", when this contract was drawn up, Exhibit "2". That I was not entitled to any and to leave me out from it. I was present at the time the document Exhibit "2" was signed. Mr. Massey was present, and Mr. Edginton and Mr. Barber was present. It was signed in Mr. Ramsey's office. There was a conversation at that time relative to the previous contract which had existed between William Barber and the various persons mentioned. This terminated all previous understandings and contracts. The conversation was that this cancelled all former understandings and contracts. Mr. Ramsey said it and everybody understood it. Mr. Ramsey understood it. Mr. Ramsey said to Mr. Barber before he signed the contract "You understand it, Mr. Barber, this terminates and cancels all former contracts" and these men were all present. Mr. Hatter was also there. We were all there. These men were all there and received their contracts from Mr. Ramsey. Mr. Ramsey is dead.

Mrs. Barkschat did not know any of this transaction up to that time. I never talked to her about it. I did not ever discuss the contents of Exhibit "3", with my wife, Doris Barkschat, prior to the time it was delivered to her by Mr. Hatter, not until after she received it.

She wanted to know why she received it and I told her that Bill took the stand that I was not entitled to anything and that was for what she had done for him, that he

(Testimony of Henry Barkschat)

wanted her to have that money and I was out. That was in plain English.

Q. BY THE REFEREE: May I ask you this question: You and Hatter and Bill, as you call him signed this Trustee's Exhibit No. 1, which was dated the 2nd day of December, 1932. Did William Doheny at that time raise any objection to you getting any part of the money that he might secure?

A. To be truthful, your Honor, at that time he was drunk and didn't know what he signed and if you will see that the man who witnessed it was A. Eguia de Moran, and he told me at that time, he says "I don't know whether I should do this."

Q. Let me look at that signature. Will you tell me that was written by a man who was so drunk he didn't know what he was doing? Put on your glasses and look at it.

A. Well, you can see the shakiness of the hand. I don't say that was the case.

Q. You say he was so drunk he didn't know what he was doing,—he didn't know what he was doing when he wrote his name there, William Elery Barber?

A. I think he was, your Honor.

THE REFEREE: He was a pretty good writer then.

MR. REA*MS*: I think he has been drunk ever since.

THE WITNESS: He does. He would go and lie under the trees, for the last three or four years.

MR. GOODCELL: That is all.

(Testimony of Henry Barkschat)

CROSS-EXAMINATION

BY MR. PARKER:

Q. Was William Elery Barber drunk when he signed the other contract, Exhibit No. 2?

A. No, he was not. He was perfectly sober.

Q. Now you stated in the first part of your direct examination that the reason you went to Mr. Hatter's office was because you supposed we were going to subpoena him. What led you to suppose we were going to subpoena him?

A. Isn't it natural I would ask him because he was a party to the case?

Q. Did you ever tell the Trustee or any of his attorneys at any of your examinations anything about Charles V. Hatter or mention his name?

A. No, because it was farthest from my mind. I was not interested in him at that time. I never connected these two matters.

MR. PARKER: That is all.

REDIRECT EXAMINATION

BY MR. REAMS:

Q. Just one question. You did tell him about Ramsay and Mr. Hoge, or Hoge. You told them about the transaction, didn't you?

A. Yes, they knew that when I was here on the stand.

MR. REAMS: That is all.

WITNESS EXCUSED.

(Testimony of Doris Barkschat)

MR. GOODCELL: If your Honor please, in the matter of calling Mrs. Barkschat, I don't want it to be understood that we are consenting to the jurisdiction of this Court or waiving our objections at all to this proceeding.

THE REFEREE: All right. It may be so stipulated.

MR. GOODCELL: We will call Mrs. Barkschat.

DORIS BARKSCHAT,

Witness on her own behalf, was sworn and testified as follows:

DIRECT EXAMINATION.

I have known William Barber since the first part of the year 1935, when he came to me and I have taken care of him ever since. He lived most of the time during the greater portion of 1935 and 1936 and down until the time he received the money from the Doheny Estate at my home. When I married Mr. Barkschat he didn't have five cents, and I owned this house in Beverly Hills and we moved into it immediately and Mr. Barber moved in and I supplied the food and took care of him out of my own money, my own income. I gave William Barber money all the time. He had nothing. I did not charge him any board. He did not pay me anything other than the $11,250.00. Not a cent. He didn't have anything to pay me with.

I first learned that William Barber was going to give me something out of what he obtained out of the estate of Edward Doheny after he had been with me for some time and I had supported him. He said that he thought

that I ought to have it; that I had been good to him; and at that time he didn't think, in his mind, when he promised me anything, that he didn't think there was a chance of him even getting anything.

I first knew that I was actually to receive some money after he was there some time, he started to talk to me about it and said he wanted me to have it for my kindness to him when he had nothing and no home and no place to go.

I did not know that my husband, Henry Barkschat, this bankrupt, had a contract or any understanding of any kind or character, whereby he was to receive a percentage of the recovery by William Barber. All those contracts and everything were long before I was ever married to Mr. Barkschat and I never knew anything about them at all until today. I married Mr. Barkschat in October, 1934, and all this went before and I knew nothing about it. My husband, Henry Barkschat, never told me that he was to get half of what Mr. Hatter was to get. Not to my knowledge; he has never told me anything about it. I saw none of those contracts. This is the first time I ever knew they existed. I have seen a copy of Exhibit 3. This is the only one I have seen. It was handed to me up in Williamson's office. I had heard Mr. Barber talking to Henry that he didn't think he wanted him to have anything,—that I had been the one paying the bills and putting up the money and he thought I should have that for my taking care of him. That was his idea. I didn't know anything about any contracts at all. I first knew that I was to receive an assignment of a half of Mr. Hatter's interest right after—after Bill had been with me

(Testimony of Doris Barkschat)

for some time he said he thought I ought to have it. To tell you the truth I really didn't know anything about Mr. Hatter's going to assign one half of his percentage to me. I didn't know anything about any of these documents except this one handed me. That is all I knew about. Prior to the handing to me of the copy of Exhibit 3 we had discussed that Mr. Hatter was going to give me half of what was coming to him, Bill and I talked about it. At the time I received that money my husband never discussed with me going into bankruptcy, he never started talking about going into bankruptcy until the bank started harrassing me,—wanted me to sign a note and give my property over, so they could grab that too. I received this money, I think it was,—I am not just positive, on the 8th of April and it may have been the 9th. At that time I deposited in the Citizens Bank some money. With relation to that I first knew my husband was thinking of going into bankruptcy,—not until about a week before June 2nd. This money has never been in the possession of Henry Barkschat, or any part of it. I received it and kept it as my sole and separate property, the same as I have the rest of my money, and I claim to own it now.

CROSS-EXAMINATION

I base my claim of ownership of this money on the fact that I took care of Mr. Barber, supported him and gave him money and supported a house over his head, and it was his wish that I have it. Mr. Barber never gave me a statement in writing agreeing to give me anything. It was understood. We never had any agreement. In fact I never saw any of these agreements until today, with the exception of Trustee's Exhibit #3.

(Testimony of Doris Barkschat)

I have no idea why Charles V. Hatter assigned one-half of 22½% to me, rather than a quarter or three-quarters of his entire percentage. I did not furnish liquor to William Barber. I kept it from him so he couldn't get it. I didn't furnish him with money to buy liquor. I furnished him money for his clothes and things of that sort, and I kept him with me and went with him everywhere to prevent him from drinking.

I do not have now all of that money; I spent some of it. I would have to figure out how much I spent when I get home. I bought a 1937 Buick with some of the money. I did not keep that money in a bank account. I keep it at home in cash. I have lots of bad luck with banks, and have no faith in them and after the Beesmeyer bank failed and everything else I have no faith in them, and I use them only as a convenience to pay gas and light bills. I have not given any of that money to Henry Barkschat. Not at all. I have not been giving him money lately, as I used to do. He has been working and he saved enough.

I married Henry Barkschat in October, 1934. William Barber did not immediately take up his residence with me and Mr. Barkschat. He came in 1935, probably in the early part of the year. He was there most of the time and then he would go away and come back. He would not stay away very long. Some times it would be from three weeks to a month, and then he would be back again with me, but he was with me most of the time. When he lived with me, I supplied the food which he ate and gave him a room and money in small sums. I didn't give him large sums because I was afraid he would disappear and get into trouble. William Barber must be in the neighbor-

hood of fifty-five, I think. I may be mistaken in regard to his age.

I never at any time had any agreement with William Barber, not until he began to talk to me and said "If I ever get anything out of this thing," which he really never expected to get, and I paid no attention to it. He did not give me any other money, other than the eleven thousand, that is all, I would say.

WILLIAM ELERY BARBER,

produced as a witness in behalf of respondent, having been first duly sworn upon his oath, was thereupon examined and testified as follows:

DIRECT EXAMINATION

That is my signature at the end of that document and I believe that is Mr. Hatter's signature.

(Here was received in evidence Respondent's Exhibit A, reading as follows:)

"A G R E E M E N T

For and in consideration of service performed and to be performed in acting as investigator and detective in gathering information necessary to establish and prove that I am the son of Edward L. Doheny, of Los Angeles, California, and therefore entitled to share in his estate after his demise, in the event that I am not mentioned in his last will and testament, and of his having agreed to advance all costs incident to establishing and proving my interest in said estate, I agree to pay to Charles V. Hatter, a sum equal to one-fourth of, in and to any and all property

coming to me or to come, or distributable to me from the estate of said Edward L. Doheny, after his demise.

It is further understood and agreed that in consideration of his performing the above services and advancing the costs incident thereto, that in the event I am remembered in the will of my father Edward L. Doheny, I agree to pay to Charles V. Hatter, a sum equal to one-eighth of, in and to any and all property coming to me or to come or distributable to me from the estate of my father by virtue of said will.

It is further understood and agreed that out of any property recovered for me, or to come to me, by virtue of the will or otherwise, all of the disbursements of said Charles V. Hatter are first to be deducted and repaid to him.

In Witness whereof, we have hereunto set our hands this 6th day of December, 1933.

(Signed) William Elery Barber

"I agree to the above.
(Signed) Charles V. Hatter.
Witness: Addie Arnold.

(Subscribed and sworn to the 7th day of December, 1937, before Notary Public in and for Los Angeles County.)

The Witness continues: (being interrogated by the Referee)

(Testimony of William Elery Barber)

BY THE REFEREE:

Q. Now, Mr. Barber, on Monday afternoon last Mr. Barkschat testified that you and he went to the office of Mr. Hatter on a date, some time, as I recall it, in 1932, at which time a written agreement was signed by the three of you,—that is to say, by you and by Mr. Barkschat and by Mr. Hatter, in which agreement it was agreed that you employed Hatter and Barkschat to represent you in establishing your paternity. Do you remember that occasion?

A. No, I don't remember that.

Q. Now, Mr. Hatter, they have introduced in evidence here a document apparently bearing the signatures of the three of you, in which that arrangement was agreed to, that Hatter and Barkschat were to get 25 percent of any sums of money which might be recovered from the estate of E. L. Doheny; and Mr. Barkschat further testified that after the signing of that written agreement you said to him on one or more occasions that you did not think that he, Barkschat, was entitled to any compensation or pay for having aided you in establishing the facts that you wanted established, but that you felt that you were under considerable obligation to his wife, Doris Barkschat, and that you wanted whatever portion of this money which you had agreed to give to Barkschat in the original writing,—that you wanted that given to Mrs. Barkschat. Do you remember that conversation?

A. That conversation took place about a year ago.

Q Now this document you have shown me here, known as Respondent's Exhibit "A",—this was apparently executed on the 6th of December, 1933, in which you pur-

portedly employed Mr. Hatter only, for a sum equal to one-fourth of whatever money you might recover, to aid you. Was Mr. Barkschat present when that document was signed?

A. No, sir.

Q. How as it that you went to Mr. Hatter and made this document, Respondent's "A", dated the 6th day of December, 1933, employing Hatter alone, whereas you had previously signed a document agreeing to employ Barkschat and Hatter? I think you had better let the witness see that. (Document handed to witness). Look at this, Mr. Barber. It is the second sheet there. This is the document, the contract, they introduced in evidence here, in which you purportedly agreed to employ Hatter and Barkschat. (Witness reading document). Is that your signature?

A. I don't remember that contract. That is my signature.

Q. Well now, in that document, which is known as Petitioner's Exhibit No. 1, you agreed to hire Barkschat and Hatter both. Did you say that you read it?

A. Yes, sir.

Q. This was dated December 2, 1932. Now then, approximately a year later, in December, 1933, you entered into an agreement with Hatter alone, whereby you agreed to pay him 25 percent; that is this document that Judge Goodcell showed you.

A. Well, that instrument, as I remember, was drawn to Mr. Hatter's desire, but I really don't remember the details of the situation. At that time Mr. Barkschat was out of town quite a bit, and what arrangements he and Mr. Hatter had I knew nothing about.

(Testimony of William Elery Barber)

Q. Well now, let me ask you this: By this document known here as Respondent's "A", introduced by Mrs. Barkschat's Counsel, it is provided that Hatter is to receive one-fourth of all moneys that come to you. Now can you tell me how it comes, or how it came about, that Hatter assigned one-half of his interest to Mrs. Barkschat; do you know anything about that?

A. Well, I asked Henry, when he told me that he still had a half interest—

Q. Asked who?

A. Mr. Barkschat. When he told me he still had a half interest in Mr. Hatter's share, I told him I didn't think that he deserved it; that I promised Doris Barkschat something if we win the case, and if he had anything coming that he should give it to her,— that she did me quite a number of favors.

Q. Well, what did Mr. Barkschat say to that?

A. He said he would.

Q. Well, do you know of any paper that was signed by Mr. Barkschat, or did you ever see a paper wherein Barkschat assigned his interest to his wife, or to any other person?

A. I saw it I think Saturday for the first time.

Q. Where did you see that Saturday?

A. Well, I don't know whether it was out at the house or down at the lawyer's office.

MR. GOODCELL: I think he refers to Exhibit 3, if your Honor please,—a copy of Exhibit 3. I think that is what the witness refers to here.

(Testimony of William Elery Barber)

Q. BY THE REFEREE: Now is this what you mean, where Charles V. Hatter assigns his one-half interest to Doris Barkschat,—is that the document you were speaking of?

A. That is the instrument, yes, sir.

Q. But the question I asked you was did you ever see a paper or writing which was signed by Henry Barkschat in which he relinquished or assigned any part of his interest in the Hatter contract?

A. I never did.

MR. GOODCELL: May the record show, if your Honor please, that the document referred to in the answer to the previous question to this one, is a copy of the assignment of March 29, 1937, which is Exhibit 3, I think, in this case?

THE REFEREE: Yes.

The Witness continues:

I was present when the attorney who represented me in the negotiations with the Doheny estate distributed the money that amounted to about $100,000.00. I authorized it. I was present when the money was paid to Mr. Hatter. Mrs. Barkschat received the portion that went to her. She was there.

(Testimony of William Elery Barber)

(Here was received in evidence Respondent's Exhibit B, reading as follows:)

"Los Angeles, California,
April 8, 1937.

Williamson, Ramsay & Hoge,
433 South Spring Street,
Los Angeles, Calif.

Dear Sirs:

The undersigned hands you herewith Cashier's check in the amount of One Hundred Thousand Dollars ($100,000.00) dated April 7, 1937, drawn on the Security-First National Bank of Los Angeles, Olympic and Flower Branch, which check is duly endorsed for transfer. You are authorized and directed to distribute the money from said check as follows:

Ralph Edgington	$ 5,000.00
Lloyd R. Massey	12,500.00
Charles Hatter	11,250.00
Doris Barkschat	11,250.00
William E. Barber	32,500.00
Williamson, Ramsey & Hoge	27,500.00
Total	$100,000.00

Very truly yours,
(Signed) William Barber
William Barber

WH:VH
2 B.
Doheny Matter.

(Testimony of William Elery Barber)

The Witness continues: (Questions by Mr. Goodcell).

That is my signature on the bottom of Trustee's Exhibit 2. I remember signing it. My understanding was that the contract for 1936, Trustee's Exhibit 2, cancelled all other contracts. I couldn't say whether Mr. Barkschat was present when Trustee's Exhibit 2 was signed, the contract which I say I understood abrogated all previous contracts was entered into.

That is my signature on Trustee's Exhibit 1. I don't remember whether Barkschat was present when that contract, Trustee's Exhibit 1, was signed. I don't remember that contract being in existence at all. But that is my signature, never-the-less. I don't remember anything about it at all. I felt I ought to give Mrs. Barkschat $11,250.00 because she befriended me when I was down and out. She fed me and let me have money as I needed it, and it has been my home for the last two years. I gave her the identical sum of money that I gave to Mr. Hatter simply because that is what Henry Barkschat said that he had coming from the outfit. The last time that Henry Barkschat said to me that he had something coming out of this Hatter contract was about a year before the settlement was to be made. At that time we didn't know what it would be,—whether it would be anything. Much or little or nothing. I told Mrs. Barkschat that I would see that she got something out of it. There was no specified amount or anything else. I do not remember or have any recollection of entering into this agreement with Hatter and Barkschat in December, 1932. I remember entering into it with Mr. Hatter but I don't remember Mr. Barkschat being in that agreement. I must have

(Testimony of William Elery Barber)

known that Barkschat claimed to have an interest in Hatter's contract at the time that contract was signed, but it has slipped my mind or I have forgotten about it. A year ago I asked him to turn that over to Doris. He mentioned the fact that he still had an interest with Hatter. Mr. Barkschat was in Mexico and I didn't know that he still had an interest.

CROSS-EXAMINATION

BY MR. PARKER:

I stated that I had a conversation about a year ago with Henry Barkschat at which time I asked him to turn over to Doris Barkschat the half interest that he had in Mr. Hatter's contract. I didn't know that he had any interest. I asked him to assign his half interest to Mrs. Barkschat because he told me he had it. I didn't ask him upon what he based that right. That conversation took place at Doris Barkschat's home. Whenever I was in Los Angeles that was my home. I couldn't say how much time in the last two years I spent in Los Angeles. I have been there a week at a time and sometimes I would be gone for a month or two and at one time I spent over three months there. That was after Christmas, 1936, until April 8, 1937, when this settlement of the estate matter was effected. All of that time I lived at Doris Barkschat's and Henry Barkschat's residence.

I couldn't say off hand what other period within two years last past I lived at this house, but I had a key to their house for the last two years. I came and went, just as I wanted and used it as my own home, which it was. Apart from the period from December, 1936 to April 8,

1937, out of the remaining 21 months of that two year period I would say I spent altogether perhaps four months at their house. That doesn't include those three months That is just the time I was there. I would be there for a week or ten days and then would go out and look for work. I was not employed. I was employed on a W. P. A. project, if you call that employment. I call it relief. For my work on the W. P. A. project I received anywheres from a dollar a week to fifteen dollars a month. I think I first went on that relief in 1934. I was on that work, you might say, continuously from 1934, but I didn't stay out there all the time. I got permission to leave for periods of time. And on those periods I came down here to Los Angeles, and stayed at the house of Doris Barkschat. They allowed us to go at any time we wished to look for work and any time I was looking for work and was here in Los Angeles I made my home at Doris Barkschat's house. Last summer my work had to do with the Forestry work.

This conversation that I had with Henry Barkschat about a year ago, in which I suggested to him that he turn over any moneys that he got from my settlement, or turn over his half, to Doris Barkschat took place at his house, Henry Barkschat's. Nobody was there but Henry and I. I did not give Doris Barkschat any of the money that I got out of that settlement.

I don't remember when I first went to see Mr. Hatter. I couldn't give you the dates when I first went to see Ralph Edgington or Lloyd Massey. I saw Hatter before I saw Edgington or Massey. Mr. Hatter made the investigation. On his suggestion I went to Massey and Edgington. According to the contract there it must have

been 1932 that Mr. Hatter started to make this investigation. Not before that, I don't think. I don't remember. Mrs. Barkschat, the former Mrs. Barkschat, who was my aunt, took me to Mr. Hatter. The fact is I believe Mr. Hatter came to the house, come to think of it. I later called at his office. I went there alone most of the time. I went there sometimes with Henry Barkschat. I couldn't say how often. Not very often.

Later I contacted another firm of attorneys,—Williamson, Ramsey & Hoge. That was after Mr. Barkschat came back from Mexico and I talked the situation over with him and Massey and Ramsay had misrepresented to me and Mr. Barkschat advised me to get some more able attorneys. Henry Barkschat interested himself in my claims in this matter. I wouldn't say from 1932 on. I don't know of any interest he showed in it until he got in touch with Williamson, Ramsay and Hoge. I am not very much of a business man and the way the thing set it didn't look very good and he suggested more able attorneys whom he introduced me to. He took me to the office of Williamson, Ramsay and Hoge, and I went to their office several times, probably half a dozen but not quite frequently. Sometimes Henry Barkschat was along with me, and sometimes he was not. I couldn't say how many times of the half dozen times he would be along with me. I don't remember. After he got me in touch with Williamson, Ramsay and Hoge it was them and me for it from then on.

The original letter, of which Respondent's Exhibit No. B is a copy, was written in Williamson, Ramsey and Hoge's office. Nobody told me to sign it. They just

handed it to me and wanted to know if it was okay and I said okay, it was right, and signed it. I asked them to prepare it for me. I asked Mr. Williamson. The check was made out to me personally and it was taken to their office and signed over to them and the distribution was made by Mr. Hoge. I signed it over to them. I endorsed this check for $100,000.00 in blank and handed it over to Mr. Hoge. I do not know who the witness is, Addie Arnold, to Respondent's Exhibit "A". I don't remember when I signed Respondent's Exhibit "A". I remember the instrument, but I don't remember the details.

Mr. Hatter got $11,250.00, which is not 1/8th of what I got, but 11½% of the whole. According to this instrument, it was my understanding that if I was remembered in the Will of my father Hatter was to get one-eighth, but if I was not remembered he was to get one-fourth.

I signed Trustee's Exhibit No. 2 on the date it bears, before a Notary Public in Williamson, Ramsay and Hoge's offices. I don't remember who was present at the time. I do not know who the witnesses were who signed it. The matter of the contract was not discussed before it was actually prepared and signed by me. I executed it because when I read the contract it was satisfactory, and so I signed it. My understanding was that that cancelled all prior contracts. That contract only cancelled the two contracts of December 7, 1933, but I asked Mr. Williamson about it and he said it cancelled all prior contracts. I didn't ask him to put that into the contract.

Mr. Williamson told me that that contract, Trustee's Exhibit 2, not only cancelled the two prior contracts

(Testimony of William Elery Barber)

therein named but also cancelled any prior contracts I had with Mr. Hatter. I must have had some prior contracts with Mr. Hatter. He wouldn't have went out on the investigation without any contracts. I couldn't tell you how many contracts I had with Mr. Hatter prior to this one. I don't know whether there were more than one. In fact I had forgotten about this one, Trustee's Exhibit 1. But I knew there were agreements with Mr. Hatter of some kind prior to the making of this contract in 1936, but what they were I didn't know and I didn't have.

I understood that under this contract, Trustee's Exhibit 2, this contract of 1936, that the percentage that was to go to Mr. Hatter or anyone associated with him by any prior contract, was reduced from 25% to 22½%. I understood that the percentage was cut down all the way around. Mine was cut from 52% to 32%. Massey's was not changed. I don't think so. I can't recall any other contract with Mr. Massey. He got, I think, $12,000.00. I don't know what the percentage was. It would be one-eighth I think. That was the figures that was agreed among all the attorneys and myself.

I said that about a year ago I understood Henry Barkschat was to get half of whatever Hatter got. I don't know how much money I received from Doris Barkschat. She gave me all the way from a dollar to ten dollars at a time, but how many times that occurred I don't know what the amount would be. I haven't any idea at all. It would not amount to $11,250.00. It would not amount *of* $1,000.00.

(Thereupon the Respondents rested, and the Trustee produced the following testimony on rebuttal:)

CHARLES V. HATTER,

Witness for Trustee, was recalled on rebuttal and testified as follows:

DIRECT EXAMINATION

I recall when Mr. William Barber first came to my office with reference to his claim in the matter of this estate. It was at the date that Trustee's Exhibit 1 bears. That contract was executed in my office. All the parties who signed it were there at that time, I suppose so, certainly. I do not particularly recall the instrument now, every little thing, but there was a part we talked about, that, and the contract was drawn up and signed and that ended that part of it. I had talked about it with those parties to the contract, Mr. Barber or Mr. Barkschat, prior to the time this contract was executed. There was Mrs. Barkschat, Mrs. Emily Barkschat I mean, and Mr. Barber came in and I discussed matters to see what there was and then the contract was drawn up after Mr. Barkschat called on me. I would not state that when Mr. Barber signed that contract on December 2, 1932, Trustee's Exhibit 1, that he was drunk, not that I know of. If I had believed or had reason to think that this man Barber was intoxicated at the time this contract was signed, I would not have signed it with him, knowing him to be intoxicated.

That is my signature at the lower left-hand corner of Respondent's Exhibit A. I had already entered into one contract with William Barber. I don't recall now the

(Testimony of Charles V. Hatter)

reason for entering into this one. That is too long ago. I cannot remember, but I know that this had been drawn up, but I cannot give any particular reason at that time. I don't know. I cannot recall whether at the time this document, Respondents Exhibit A, was signed there was any discussion between me and Mr. Barber as to the elimination or the cutting out of Mr. Barkschat who was in the original contract. I cannot recall that. I would have to give this considerable thought and look up certain records I may have. Mr. Barber did not at any time tell me that he wanted Barkschat cut out of this contract,—that he felt that Barkschat had no right to recover any part of it. Mr. Barber did not at any time tell me that he wanted such portion as Barkschat was to have had under the original document, Trustee's Exhibit 1, to go to Mrs. Doris Barkschat. He wouldn't do that because Mr. Barkschat worked on the case also and did very good work. I cannot say definitely that at any time Mr. Barkschat himself told me that he wanted any moneys that might have been coming to him transferred or paid to any other person. I wouldn't say definitely at this time;—I could not say.

There was no other contract or agreement entered into between myself and Henry Barkschat in connection with Respondent's Exhibit A, or at that time. Henry Barkschat and I had an understanding that he was to receive half of what I got. That understanding was to exist and continue, regardless of the execution of that docu-

ment, Respondent's Exhibit A absolutely. I don't recall any conversation with Mr. Barkschat as to the disposition of the other half of the money that I am to receive previous to the time of the settlement. Pardon me,—I may have to correct my statement if I think a little bit more. I have to correct my answer. I believe it was previous to that time. We were up at Mr. Ramsay's office and that was just about a week previous to the settlement. I think there was myself and Mr. Barber and someone else, who were present, and then when this paper here was drawn up in Mr. Ramsay's office and where then I assigned the half that I was originally to pay to Mr. Barkschat, to Mrs. Doris Barkschat,—that is when I drew that up. I didn't care particularly as it didn't matter how the half was to be distributed,—it wasn't my property if I would get it.

I cannot clearly remember—who suggested that I sign this document here which is known as Trustee's Exhibit No. 3, which is the assignment of the 29th of March, 1937; who first aproached me to assign 50% of my interest to Doris Barkschat; who asked me to do that. I couldn't say that Mrs. Doris Barkschat asked me to make such an assignment. I couldn't say Mr. Barkschat did, or who. I don't remember how it came about. I was very busy at that time. I don't recall now.

I did talk with Mrs. Barkschat at various times in the evenings when Mr. Barkschat was not at home and I made certain investigations and did certain work and conveyed

(Testimony of Charles V. Hatter)
the information, and if Mr. Barkschat was not there I would tell Mrs. Barkschat. But this contract,—I couldn't say. I don't remember who asked me. I cannot say that. I don't remember.

I was under obligation to pay 50% of what I got. I did not pay Henry Barkschat 50% of the $22,500.00 that was due me. No, I don't still owe it to him. This document, Trustee's Exhibit No. 3, was prepared in Mr. Ramsay's office. I don't know who prepared it. It was handed to me and I signed it. I did not have any discussion with anybody concerning the preparation of it. It was handed to me and I signed it because it covered the 50% of the money that I would receive. I don't recall who told me to sign it. It was in Ramsay's office. I don't remember who told me to sign it.

"Q. (By Mr. Parker) Well, as a matter of fact, did you have any conversation at any time with Henry Barkschat that you were to dispose of this money as he should direct?

A. That I should dispose of it?

Q. As he should direct.

A. Well, there was never any talk in such words.

Q. Well, what was the talk?

A. That I know of, we talked and I asked him if he considered that my obligation was 50 per cent to be paid and it didn't matter to me who got the 50 per cent as long as it was satisfactory to all concerned.

(Testimony of Charles V. Hatter)

Q. When you say 'satisfactory to all concerned' who do you mean?

A. Well, I mean to Mr. Barber and Mr. Barkshat and myself and Mr. Massay and Mr. Ramsay."

. . . . . .

. . . . . .

"Q. Were you told by anybody that they were satisfied, any of those parties?

A. No, they didn't tell me they were satisfied at all, but that was the original agreement and half of it was mine and half of it belonged to somebody else, and that was the end of it.

Q. Well, who did the other half belong to, now?

A. Well, the original contract was for Mr. Barkschat and then when the time came, well, then, the money was transferred,—that is, the rights to that money, were transferred to Mrs. Doris Barkschat."

The Witness continues:

Henry Barkschat and I were always conferring; that is not daily, but from time to time, about evidence secured and otherwise, on the work performed, from time to time. I was not familiar with the business and the affairs of Mr. Barkschat at that time. I never had anything to do with Mr. Barkschatt's own personal business matters.

WITNESS EXCUSED

(Testimony of Henry Barkschat)

HENRY BARKSCHAT,

Recalled as a witness for the Trustee, testified as follows:

DIRECT EXAMINATION

I told Mr. Hatter to assign one-half of his interest in the Doheny matter to my wife, Mrs. Doris Barkschat, on the strength of Mr. Willam Barber telling me he didn't want me to have it; he wanted Doris to have it. I remember distinctly when it was that I first told Mr. Hatter that I wanted him to assign or transfer whatever interest I had or might have in that matter to Mrs. Barkschat. That was about the time Mr. Williamson came to an agreement with the other side. That was this year, 1937. It was quite a while before the date of the settlement in this matter. I wouldn't say how many months; I wouldn't dare state it in months; but in the beginning there was practiically no response,—it looked like a loss and I said nothing; I let things ride; and so, finally one day Mr. Williamson told me it begins to look like we can come to something positive, because neither side wanted publicity, and at that time I told Mr. Hatter what had transpired and asked him to transfer it to my wife, and he didn't do it for quite a while. When I say at that time I mean early in 1937. The first time that Mr. Barber told me that in his opinion I should not take any part of that money, that I was not entitled to it, was in 1936. That was over a year ago, when we discussed the matter. The conversation came up one time and I told him frankly I expect one-half of Hatter's interest; I tried to get something out of it from Hatter, and Barber told me then "I don't think you should take that; you are not entitled to it," and he says "I want

to give Doris something, what you get you should give to Doris." I first told Hatter that I wanted him to transfer that to my wife when the thing began to look as if it would materialize. When that was,—the dates I really could not give you. It began to look as though something would materialize, I think it was either late in 1936 or early in 1937. I could ask Mr. Williamson, I couldn't remember.

WITNESS EXCUSED.

Both sides then rested and the cause was argued by counsel for the respective parties and upon the conclusion of the arguments the Court stated:

"THE REFEREE: It is my opinion that there is constructive possession here, and the order will be that this money, or so much of it as remains, will be turned over to the Trustee, on the ground or upon the theory that this manifestly was Barkschat's money. I cannot come to any other conclusion. The testimony of Hatter is that he turned it over,—it didn't make any difference to him who got it. And Barkschat, himself, says that he suggested to Hatter that in view of the fact that Mr. Barber thought he shouldn't have it, to pay his part of the money under this contract to his wife. So that will be the order, and you may prepare an order directing the turn-over to the Trustee."

MR. PARKER: Well, I think at this time, if your Honor please, that the order should read that the constructive possession of the funds, as your Honor stated, is in the bankrupt and the Trustee at the time of adjudication. Mrs. Barkschat has testified that she doesn't

know what funds she has on hand; she says she would have some records or something by which that could be ascertained and I think we will need a further hearing on that; but if the order at the present time will provide an injunction and restraining order against disposing of any of the funds I think that will satisfy the matter, and if Mrs. Barkschat will endeavor to advise us of what disposition she made of the funds and what funds were on hand at the time of the adjudication, we could proceed a little bit more to the point. I will prepare an order along that line, if that is satisfactory.

THE REFEREE: Well, draw such an order and present it to Counsel for approval.

The Referee then directed counsel for the Trustee to prepare an order and present it, to which ruling counsel for respondent, Doris Barkschat, noted exceptions. Thereafter the order of the Referee in this matter, dated October 6, 1937, entitled Turn-over Order and Restraining Order against Henry Barkschat, Bankrupt, and Doris Barkschat, his wife, was signed by the Referee in Bankruptcy and filed in this proceeding. Thereafter a petition of the respondent, Doris Barkschat, appellant herein, for a review of the said order of the Referee was filed in this proceeding, and the Referee's certificate on review, and reporter's transcript of proceedings before the Referee, were filed in this matter, and the petition for review came on for hearing before the District Judge who took same under submission after argument of respective counsel and under date of February 3, 1938, entered his Minute Order sustaining the rulings of the Referee in Bankruptcy in this matter and the said Turn-over Order.

ORDER APPROVING AMENDED STATEMENT OF EVIDENCE

The foregoing Amended Statement of Evidence in this case having been prepared by Doris Barkschat, Appellant, and duly lodged in the office of the Clerk of this Court by said appellant, and the same being all of the evidence adduced at the hearing in the above entitled matter before Hugh L. Dickson, Referee in Bankruptcy, and considered by the United States District Judge on the Hearing of the Petition for Review in this matter, said Amended Statement of Evidence is approved and certified as a true, complete and properly prepared Statement of Evidence in the above entitled cause and the same is ordered incorporated in the record on appeal herein, and that wherein said Amended Statement of Evidence contains the testimony of witnesses reproduced in the exact words of said witnesses the same is hereby approved and confirmed.

Dated this Aug. 4, 1938.

Geo. Cosgrave
UNITED STATES DISTRICT JUDGE.

It is hereby stipulated that the foregoing order may be signed and entered.

REX B. GOODCELL AND
MANLEY C. DAVIDSON
BY: Manley C. Davidson
Attorneys for Appellant.
Ignatius F. Parker
Attorneys for Appellee.

[Endorsed]: Lodged R. S. Zimmerman Clerk at 12:59 o'clock Jul. 8, 1938 P. M. By F. Betz, Deputy Clerk. Filed R. S. Zimmerman, Clerk at 13 min past 2 o'clock Aug. 5 1938 P.M.; by M. J. Sommer, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

In the Matter of	)	
	)	In Bankruptcy
HENRY BARKSCHAT,	)	
Bankrupt	)	No 29,974-C.

PETITION FOR APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT, BY DORIS BARKSCHAT, FROM AN ORDER MADE AND ENTERED ON FEBRUARY 3, 1938, SUSTAINING THE FINDINGS AND CONCLUSIONS OF THE REFEREE AND IN EFFECT AFFIRMING TURNOVER ORDER AND RESTRAINING ORDER AGAINST HENRY BARKSCHAT, BANKRUPT, AND DORIS BARKSCHAT, his wife; and ORDER GRANTING SAID APPEAL.

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION:

The Petitioner, DORIS BARKSCHAT, considering herself aggrieved by the Order made and entered on February 3, 1938, in the above entitled proceedings, in that said Order in effect denied the petition for Review of the above named Doris Barkschat of an order of Hugh L. Dickson, Referee in Bankruptcy, requiring petitioner to turn over to the Trustee in the above entitled matter,

forthwith, the sum of $11,250.00, and enjoining and restraining said petitioner from transferring, assigning or turning over said sum, or any portion thereof, or any property acquired by said sum, to any person whomsoever other than said Trustee, and that said order, as aforesaid, sustained the Findings and Conclusions of said Referee; and in that said order, as aforesaid, in effect adjudged and decreed that petitioner herein turn over and deliver to said Trustee said sum of $11,250.00, and be restrained and enjoined from transferring, assigning or turning over said sum, or any part thereof, or any property acquired thereby, to any person other than said Trustee; does hereby appeal from said order to the United States Circuit Court of Appeals, for the Ninth Circuit, for the reasons specified in the Assignment of Errors, which is filed simultaneously herewith; and Petitioner prays that this, her appeal, may be allowed and that a Citation may be granted, directed to Frank M. Chichester, Trustee in Bankruptcy herein, commanding him to appear before the United States Circuit Court of Appeals for the Ninth Circuit, to do or receive that which may appertain to justice to be done in the premises, and that a transcript of the record and evidence in said proceedings, upon which said Order was made, duly authenticated, may be transmitted to said United States Circuit Court of Appeals for the Ninth Circuit; and

Petitioner further prays that the proper order may be made relating to the security to be required of her.

Dated this 28th day of February, 1938.

Doris Barkschat
Petitioner

Rex B. Goodcell
Manley C. Davidson
Attorneys for Petitioner

ORDER

And now, to-wit: on the 1st day of March, 1938, IT IS ORDERED that the appeal be allowed, as prayed for.

Bond on appeal fixed at $250.00.

Geo. Cosgrave,
Judge of the District Court of the United States, for the Southern District of California, Central Division.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 35 min. past 9 o'clock Mar 1, 1938 A. M., By M. J. Sommer, Deputy Clerk.

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

IN RE APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT BY DORIS BARKSCHAT, FROM AN ORDER MADE AND ENTERED ON FEBRUARY 3, 1938, SUSTAINING THE FINDING AND CONCLUSIONS OF THE REFEREE AND IN EFFECT AFFIRMING TURNOVER ORDER AND RESTRAINING ORDER AGAINST HENRY BARKSCHAT, BANKRUPT, AND DORIS BARKSCHAT, his wife.

Comes now Doris Barkschat, and files the following Assignment of Errors upon which she will rely upon her appeal from the order made and entered on February 3, 1938, by this Honorable Court, in the above entitled matter, and said Doris Barkschat states that said order is erroneous and against her just rights, for the following reasons:

(1) The District Court erred in denying in effect, by its said order of February 3, 1938, the petition of said Doris Barkschat for a review of Referee's order, made on October 6, 1937, by the Honorable Hugh L. Dickson, Referee in Bankruptcy, in the above entitled proceedings.

(2) The District Court erred in ordering, in effect, by its said order of February 3, 1938, that said Doris Barkschat forthwith turn over to Frank M. Chichester, as Trustee in the above entitled matter, the sum of $11,250.00, and be enjoined and restrained from transferring, assigning or turning over said sum, or any part thereof, or any property acquired thereby, to any person whomsoever other than said Trustee.

(3) The District Court erred in ordering, in effect, that it has jurisdiction to make and enter its said order of February 3, 1938, and that the Referee had jurisdiction to adjudicate in a summary proceeding the controversy in reference to the possession, control and ownership of the money in question, because the evidence shows that the referee and said District Court was without jurisdiction to adjudicate such controversy, it appearing conclusively from such evidence that appellant's claim to the money in question was substantial and adverse and she was in exclusive possession thereof at the time of the filing of the Petition in Bankruptcy by the Bankrupt, and that she, at all times, objected to the consideration of her rights and the subject matter of said money in a summary proceeding.

(4) The District Court erred in ordering, by its said order of February 3, 1938, that the Findings and Conclusions of said Referee be sustained, and in ordering in effect, that the order of the Referee be approved and affirmed for the following reasons:

(a) The said Referee had no jurisdiction, without the consent of appellant, which was expressly withheld, to make and enter his said order dated October 6, 1937, and ordering and decreeing that said Doris Barkschat turn over to the Trustee herein, forthwith, the sum of $11,250.00, received by said Doris Barkschat, as agent for, and for the account of, the bankrupt herein, Henry Barkschat, on or about April 8, 1937, and enjoining and restraining her from transferring, assigning or turning over said sum, or any portion thereof, or any property acquired thereby, to any person whomsoever other than said trustee.

(b) The said Referee erred in overruling the Objections of this appellant to the summary jurisdiction of said Referee.

(c) The said Referee erred in overruling the Demurrer and Objections of said appellant to the petition of said Trustee for Turn Over Order against Bankrupt and his wife.

(d) The Findings of the Referee to the effect and substance that said sum of $11,250.00 belonged to and was the property of the bankrupt herein, Henry Barkschat, by reason of an agreement dated December 2, 1932, between the said Henry Barkschat William Barber and Charles V. Hatter, was erroneous, in that it was without support in the evidence before the Referee, and is contrary to the evidence;

(e) The Findings of the Referee that said money was turned over to said Doris Barkschat, appellant herein, as an agent of and for the account of the bankrupt herein, Henry Barkschat, was erroneous, in that it was without support in the evidence before the Referee, and is contrary to the evidence;

(f) The Findings of the Referee that at the time of the filing of the petition in Bankruptcy in this matter, on June 2, 1937, the said Doris Barkschat held said sum of $11,250.00 as the agent of the bankrupt herein, Henry Barkschat, and for his benefit, and not as her sole and separate property, was erroneous in that there was no evidence whatsoever to support said finding, and on the contrary, as appears from the record herein, the undisputed evidence shows that the said Doris Barkschat is the owner, and was in exclusive possession of said money, on April 8, 1937, a date prior to the filing of the bankruptcy

petition herein, and as her sole and separate property, and that she did not hold said sum, or any part thereof, as the agent of the bankrupt herein, or for his benefit at any time whatsoever;

(g) The finding of the Referee that at the time of said adjudication herein the control and right of possession to said $11,250.00 was in the bankrupt herein, Henry Barkschat, was erroneous, in that there was no evidence whatsoever to support said finding. On the contrary, as appears from the record herein, the undisputed evidence shows that at the time of said adjudication, the control and right of possession to said $11,250.00 was exclusively in said Doris Barkschat, and that said bankrupt, Henry Barkschat, held and claimed no interest whatsoever in and to said sum, or any part thereof;

(h) That the finding of the Referee that the claim of said Doris Barkschat to ownership of said funds, at the time of adjudication herein, is merely colorable, a mere pretense and without any legal justification was erroneous, in that it was without support in the evidence before the Referee and is contrary to the evidence;

(*I*) That the finding of the Referee that the transfer of said funds to Doris Barkschat was without any consideration from Doris Barkschat, and was a fraud upon the creditors of this estate, and said transfer was made for the purpose of concealing said funds from the then existing creditors of the bankrupt herein, was without support in the evidence before the Referee, and is contrary to the evidence;

(j) The said Referee had no jurisdiction to make said findings and conclusions and said order in a summary proceeding, or at all;

(*K*) The said Referee erred in finding that said Referee and said District Court have summary jurisdiction to order the said Doris Barkschat to turn over and account to the Trustee herein for said funds, because the evidence before the Referee showed that appellant was an adverse claimant to the money mentioned in said petition of said Trustee, and that her rights thereto could not be determined in a summary proceeding, without her consent, which was at all times expressly withheld;

(l) The Referee erred, and was without jurisdiction without the consent of appellant which was expressly withheld, when he proceeded to and did determine the merits of appellant's claim and made his Findings and Conclusions of Law and his said order dated October 6, 1937, after the preliminary investigation conducted by him had brought out the sworn testimony, to the effect in substance that said money was paid to appellant prior to the bankrupt's filing of the petition in bankruptcy herein, and was received and held by her as her sole and separate property, and at all times since then claimed to be her sole and separate property; that her claim to title thereto was derived from one William Barber, a stranger to the proceedings herein, and not the Bankrupt, and that the said William Barber caused said money to be transferred to her in pursuance to a promise previously made by him so to do in return for the care, support and moneys theretofore furnished said William Barber by her; that she had no knowledge of any of the transactions and agreements existing between said bankrupt, said William Barber and said Charles V. Hatter until the hearing before said referee; that said bankrupt had never had possession of the money, or any part of it, and never considered it, or any part of it, as his money, and that he had no

agreement with said Doris Barkschat that when the bankruptcy matters were concluded she would turn over or deliver to him said money, or any part of it, because said sworn testimony conclusively showed that appellant was an adverse claimant;

(m) The Referee erred and lacked jurisdiction to pass upon the truthfulness of the testimony given by the appellant and the witnesses William Barber and Henry Barkschat, the bankrupt, and the weight of their testimony, and thus determine the merits of appellant's claim in a summary proceeding over the objection of appellant;

(n) The Referee erred in ordering, by his said order dated October 6, 1937, that said appellant turn over to the Trustee herein forthwith the sum of $11,250.00 received by said appellant as agent for and for the account of the bankrupt on or about April 8, 1937, because the evidence before the referee conclusively shows that she was not in possession or control of said entire sum of $11,250.00, at the time of filing the Trustee's Petition for Turn Over Order or at the time of the hearing before the Referee, and that said evidence discloses that appellant had spent portions of said sum prior to said times, and there was no evidence from which the referee could ascertain or determine the amount of the balance of said sum of $11,250.00 remaining in the possession or control of said appellant at said times;

(o) The District Court erred by its Order of February 3, 1938, by ordering in effect, that said order of the referee be affirmed and approved, because there was no evidence from which said District Court or said Referee could ascertain whether said appellant was in possession or control of said sum of $11,250.00, or of what portion thereof, at the time of the filing of the

Trustee's Petition for Turn Over Order, or at the time of the hearing before said Referee, or at the time said Referee made his order, or at the time said District Court made its said Order, and for the reason that the evidence shows that appellant had spent part of said sum of $11,250.00, and the amount remaining in her possession or control was never determined or ascertained by said Referee or by said District Court.

(5) The District Court erred by its said order of February 3, 1938, for the following reasons:

(a) In ordering that the money in question was at all times the property of the bankrupt, in that it was without support in the evidence, and is contrary to the evidence, and that said Court was without jurisdiction to so find and conclude.

(b) The order of said District Court that the purported transfer of said money to Doris Barkschat was palpably a pretended transfer only and that her claim of ownership had no substantial basis whatsoever, was erroneous, in that it was without support in the evidence, and is contrary to the evidence, and said District Court was without jurisdiction to so find and conclude in a summary proceeding over the objections of said petitioner.

(c) That the order of said District Court that the claim of said Doris Barkschat had no substantial basis whatsoever and was so unsubstantial and obviously insufficient, either in fact or law, as to be plainly without color of merit and a mere pretense, was without support in the evidence, and is contrary to the evidence, and that

said District Court was without jurisdiction to so find and conclude in a summary proceeding over the objections of this appellant.

(d) That the order of said District Court that the consideration for the transfer of the money to appellant was community property was without support in the evidence, and is contrary to the evidence, and that said District Court was without jurisdiction to so conclude in a summary proceeding over the objections of this appellant.

(6) The District Court was without jurisdiction to make and enter its said order of February 3, 1938, and the Referee was without jurisdiction to make or enter the order which was in effect approved and affirmed by the order of said District Court.

WHEREFORE, your petitioner prays that the Court allow an appeal herein from said order of February 3, 1938, and fix the amount and approve a cost bond upon said appeal.

Dated this 28th day of February, 1938.

Rex B. Goodcell
Manley C. Davidson
Attorneys for Appellant.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 35 min. past 9 o'clock Mar. 1, 1938 A. M., By M. J. Sommer, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

BOND FOR COSTS ON APPEAL.

WHEREAS, on the 3rd. day of February, 1938, an order was made and entered by the above court in the above entitled action in favor of the Trustee in Bankruptcy, and against Doris Barkschat, Respondent, therein, and

WHEREAS, the respondent, Doris Barkschat desires to appeal from said judgment and has taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment and decree of the District Court of the United States, in and for the Southern District of California, Central Division;

NOW, THEREFORE, in consideration of the premises and of the taking of said appeal, the undersigned GLENS FALLS INDEMNITY COMPANY, a corporation duly organized and existing under the laws of the State of New York, and having complied with the regulations of the United States of America relative to the execution and filing of bonds, stipulations and undertakings in the Courts of the United States of America, does undertake, promise and acknowledge itself bound in the sum of TWO HUNDRED FIFTY and no/100 DOLLARS, ($250.00) lawful money of the United States of America to the effect that said Respondent Doris Barkschat, shall prosecute their appeal to effect and answer all costs if they fail to make their plea, and shall pay all costs which may be assessed against them on the appeal or on a dismissal thereof.

IN WITNESS WHEREOF, the said GLENS FALLS INDEMNITY COMPANY, has hereunto caused its name and corporate seal to be affixed by its duly authorized officer at Los Angeles, California, this 1st. day of March, 1938.

[Seal] GLENS FALLS INDEMNITY COMPANY,

BY: Dorothy Rutherford
ATTORNEY.

State of California)
) ss.
County of LOS ANGELES,)

On this First day of March, in the year One Thousand Nine Hundred and thirty-eight before me, HARRY LEONARD, a Notary Public in and for the said County of LOS ANGELES residing therein, duly commissioned and sworn, personally appeared DOROTHY RUTHERFORD, known to me to be the ATTORNEY of the GLENS FALLS INDEMNITY COMPANY, the Corporation that executed the within instrument, and known to me to be the person who executed the said instrument on behalf of the Corporation therein named and acknowledged to me that such Corporation executed the same.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal in the County of LOS ANGELES, the day and year in this certificate first above written.

[Seal] HARRY LEONARD.

Notary Public in and for the County of LOS ANGELES, State of California

My commission expires November 25th. 1939

The foregoing bond is hereby approved this 1st day of March 1938 and is ordered filed.

Geo. Cosgrave

JUDGE OF THE ABOVE ENTITLED COURT.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 59 min. past 10 o'clock, Mar. 1, 1938 P. M. By M. J. Sommer, Deputy Clerk.

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

In Re: APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT, BY DORIS BARKSCHAT, FROM AN ORDER MADE AND ENTERED ON FEBRUARY 3, 1938, SUSTAINING THE FINDINGS AND CONCLUSIONS OF THE REFEREE AND IN EFFECT AFFIRMING TURNOVER ORDER AND RESTRAINING ORDER AGAINST HENRY BARKSCHAT, his wife.

TO THE CLERK OF THE ABOVE ENTITLED COURT:

You are hereby requested to prepare, and within the time provided therefor by law, or such time as extended by proper order of the above entitled Court, transmit and deliver to the Circuit Court of Appeals for the Ninth Circuit, the following documents:

1. ORDER TO SHOW CAUSE, Re: Turnover Order to Bankrupt and his wife, dated September 21, 1937;
2. PETITION FOR TURNOVER ORDER AGAINST BANKRUPT AND HIS WIFE, dated September 21, 1937;
3. DEBTOR'S PETITION (Of Henry Barkschat, Bankrupt);
4. OBJECTIONS AND DEMURRER, Re: Petition and Order to Show Cause, Re: Turnover;
5. ANSWER AND OBJECTIONS OF DORIS BARKSCHAT, Re: Petition and Order to Show Cause, Re: Turnover;

6. TURNOVER ORDER AND RESTRAINING ORDER AGAINST HENRY BARKSCHAT, BANKRUPT, and DORIS BARKSCHAT, his wife, dated October 6, 1937;

7. PETITION OF DORIS BARKSCHAT FOR REVIEW OF REFEREE'S ORDER:

8. REFEREE'S CERTIFICATE ON PETITION FOR REVIEW;

9. MINUTE ORDER (entered on Judge Cosgrave's Minutes February 3, 1938.

10. PETITION FOR APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS AND ORDER THEREON (filed by Doris Barkschat);

11. ASSIGNMENT OF ERRORS (filed by Doris Barkschat);

12. CITATION (signed by Judge Cosgrave on March 1, 1938);

13. BOND (costs on appeal filed by Doris Barkschat);

14. NOTICE OF LODGMENT OF STATEMENT OF EVIDENCE AND ASSIGNMENT OF ERRORS (dated March 1, 1938);

15. AMENDED STATEMENT OF EVIDENCE, together with ORDER APPROVING AMENDED STATEMENT OF EVIDENCE when signed.

16. ORDER ADJUDGING HENRY BARKSCHAT A BANKRUPT;

17. This Praecipe.

The foregoing to be prepared, certified and transferred as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Rex B. Goodcell and
Manley C. Davidson
BY: Manley C. Davidson
Attorneys for Appellant.

Service of the foregoing praecipe and the receipt of a copy thereof is hereby acknowledged this 5th day of August, 1938.

Ignatius F. Parker,
Attorneys for Appellee.

[Endorsed]: Filed R. S. Zimmerman, Clerk, at 3 o'clock Aug. 5, 1938 P. M., By M. J. Sommer, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

PRAECIPE

To the Clerk of Said Court:

Sir:

Please print 40 copies of transcript on appeal.

REX B. GOODCELL and
MANLEY C. DAVIDSON
By: Manley C. Davidson
Attorneys for Appellant.

[Endorsed]: Filed Sept. 15 - 1938

[Title of District Court and Cause.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 124 pages, numbered from 1 to 124 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; debtor's petition; order adjudging Henry Barkschat a bankrupt; petition for turn-over order against bankrupt and his wife; order to show cause; objections and demurrer re petition and order to show cause; answer and objections of Doris Barkschat; turn-over order and restraining order against Henry Barkschat, bankrupt, and Doris Barkschat, his wife; petition of Doris Barkschat for review of Referee's order; Referee's certification; petition for review; order of February 3, 1938; notice of lodgment of statement of evidence; amended statement of evidence; petition for appeal, and order thereon; assignment of errors; bond for costs on appeal, and praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing Record on Appeal is $ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to $ and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of September, in the year of Our Lord One Thousand Nine Hundred and Thirty-eight and of our Independence the One Hundred and Sixty-third.

R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 8986.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

DORIS BARKSCHAT,

Appellant,

vs.

FRANK M. CHICHESTER, Trustee in Bankruptcy,

Appellee.

BRIEF FOR APPELLANT.

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No. 8986.

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BRIEF FOR APPELLANT.

THE PLEADINGS AND JURISDICTIONAL FACTS.

This is an appeal in a "controversy" in bankruptcy, duly allowed by the judge of the District Court. [Rec. 109.] The appellee is the Trustee in Bankruptcy of the Estate of Henry Barkschat, who was adjudicated on June 2, 1937. [Rec. 5.] As trustee he filed before the Referee his petition for a "turnover" order, wherein he alleged that the appellant, Doris Barkschat, the wife of the bankrupt, was paid the sum of $11,500.00 on or about April 8, 1937, by one William Barber; that she received said sum at the direction of the bankrupt in fraud of creditors; and that

she had no right in and to said money, and prayed for a summary order for the payment of the same to him as trustee. [Rec. 6.] All of said allegations were made on information and belief. An order to show cause was issued on said petition, returnable before the Referee. [Rec. 8.] Appellant appeared by filing objections and a demurrer to the petition [Rec. 9], and also by way of answer in which she not only challenged the summary jurisdiction of the Referee, but also alleged that the amount of money paid to her was $11,250.00, and that the same was her own property held by her adversely to the bankrupt estate and to the trustee in bankruptcy. [Rec. 11.] She further averred that she was entitled to said money as a matter of right; that she received it before the adjudication in bankruptcy and that the bankrupt had no interest of any kind therein.

Upon hearing the matter, the Referee overruled the demurrer, held that he had jurisdiction, and entered an order in conformity with the prayer of the trustee's petition. [Rec. 16.]

Appellant, feeling aggrieved by the Referee's said order, petitioned the District Court for a review of the same [Rec. 19]; and, accordingly, the Referee prepared and transmitted his certificate to that Court. [Rec. 23.] The District Court sustained the Referee [Rec. 39] and appellant filed her petition for an appeal to this Court [Rec. 107], together with her assignment of errors. [Rec. 110.]

The District Court had jurisdiction to review the order of the Referee by virtue of General Order Number 27 in Bankruptcy, promulgated by the Supreme Court of the United States.

This Court's jurisdiction of the cause arises under Section 24-A of the Bankruptcy Act. The order complained of is one involving the exercise of summary jurisdiction by the bankruptcy court in a case where appellant objected to the exercise of such jurisdiction [Rec. 9] and contended that the matters sought to be litigated were subject to juridical determination only in a plenary proceeding.

The authorities are unanimous to the effect that an appeal from an order overruling or sustaining the exercise of summary jurisdiction by the bankruptcy court involves a "controversy" as distinguished from a "proceeding" in bankruptcy; and, as such, the appeal must be allowed by the lower court.

Harrison v. Chamberlain, 271 U. S. 191, 70 L. Ed. 897;

Ramish v. Laugharn (C. C. A. Cal.), 86 Fed. (2d) 686;

In re Weissman (C. C. A. Conn.), 19 Fed. (2d) 769.

STATEMENT OF THE CASE.

Background.

The genesis for this case took place in 1932. William Barber, a nephew of the bankrupt's first wife [Rec. 48], desired to establish his paternity as a son of the late Edward L. Doheny. [Rec. 47.] At that time Doheny was still alive and it could not be then ascertained or determined whether Barber would be provided for by the Doheny estate. Barber's history and background indicate that he was shiftless, indigent and addicted to the excessive use of intoxicants. [Rec. 50.]

Barber was conceived out of wedlock but his parents subsequently married. [Rec. 48.] After Doheny "arrived" financially, he did not want Barber near him [Rec. 48] and the entire incident surrounding Barber's birth and rearing was a skeleton in the family closet. He was brought up by relatives and kept in the background. Doheny never received him in his household and more or less kept him away from his family. [Rec. 45.]

The bankrupt was conversant with the family secrets of the Dohenys, his first wife having been a sister of Edward L. Doheny's first wife. [Rec. 48, 49, 50.]

The record discloses that William Barber, upon the suggestion of the bankrupt's first wife, went to see one Charles V. Hatter, a private investigator and detective, who at one time had been associated with the Pinkerton Agency. [Rec. 48.] Barber was accompanied to Hatter's office by the bankrupt. The result of this conference was the execution of an agreement, which is referred to in the record as Trustee's Exhibit I, dated December 2, 1932. [Rec. 98.]

THE EXHIBITS.

At this time it is well to pause for the purpose of orienting ourselves with the exhibits, which are the only written instruments appearing in the record.

Trustee's Exhibit Number 1, dated December 2, 1932 [Rec. 55], is an employment agreement whereby Hatter and the bankrupt were to gather the necessary information to establish Barber's paternity as the son of Edward L. Doheny, for which he agreed to give them one-fourth (¼) of whatever he might thereby receive; but in the event that Doheny provided for him by will, then in that event they would receive one-eighth (⅛) of his legacy or bequest. It should be noted that at this time Mr. Doheny was still alive. It should further be noted that the bankrupt, who was a party to this agreement, was neither an investigator, detective, sleuth nor an attorney at law. [Rec. 3, 102.]

Chronologically, the next instrument is *Respondent's Exhibit "A"* [Rec. 85], dated December 6, 1933. It is an agreement between Barber and Hatter, whereby Barber promised that for and in consideration of Hatter's acting as investigator and detective to prove him to be the son of Edward L. Doheny, in the event that he was not mentioned in Doheny's last will, he agreed to pay Hatter one-fourth of all property to which he may find himself possessed. The agreement further provided that in the event that he was remembered in the will of Doheny, he would pay to Hatter one-eighth of what he might receive.

On the same date, to-wit, December 6, 1933, *Trustee's Exhibit Number 4* [Rec. 72] was entered into by and between Barber and Lloyd R. Massey, an attorney at law,

wherein and whereby Massey was appointed as the attorney to represent Barber in his anticipated litigation with the Doheny estate and for which services he assigned to Massey a one-fourth (¼) interest in whatever might be recovered. Hatter's name appears as a witness to this exhibit.

Trustee's Exhibit Number 2, dated March 23, 1936 [Rec. 58], is an assignment from Barber to Hatter of 22½% of whatever he might receive from the Doheny estate, it being specifically provided therein that the consideration for this agreement was "the cancellation of that certain contract executed on the 7th day of December, 1933, by and between myself (Barber) and Lloyd R. Massey, and the cancellation of that certain contract executed on the 7th day of December, 1933, by and between myself (Barber) and Charles V. Hatter."

On March 29, 1937, an assignment was executed by Charles V. Hatter which appears in the record as *Trustee's Exhibit Number 3* [Rec. 60], whereby Hatter assigned to Doris Barkschat, the appellant herein, 50% of all his right, title and interest in and to the Doheny estate.

The final exhibit is dated April 8, 1937 [Rec. 91], and is a letter addressed by Barber to Williamson, Ramsay & Hoge, attorneys at law, instructing them to make distribution of the $100,000.00 settlement received by Barber from the Doheny estate. For our purposes the pertinent portion of these instructions is the direction to pay to Doris Barkschat the sum of $11,200.00.

It is well to note that the only exhibit in which the bankrupt is named or mentioned is the original employment agreement with Hatter which was modified and cancelled

a *year* later and in which the bankrupt is neither mentioned nor described. Beyond putting Barber in touch with Hatter, and arranging for the employment of a firm of attorneys, the bankrupt did little more in aiding Barber in establishing his claims. [Rec. 48.]

THE TESTIMONY.

The appellant, Doris Barkschat, who is the bankrupt's second wife, owned the home in which she and the bankrupt lived, and she maintained the same out of her own separate funds, providing for all necessary living expenses. [Rec. 81.] From 1935 on, Barber lived at appellant's home and he regarded himself as a part of the household. Appellant fed him, was kind to him and attempted to restrain him from imbibing too strongly in liquor, clothed him and from time to time advanced sums of money to him. [Rec. 84.] On many occasions Barber told appellant that he wanted her to have a portion of whatever he might receive from the Doheny estate, but at no time did she have any knowledge concerning her husband's interest in the original Barber-Hatter agreement. [Rec. 82, 84.]

At this time it would serve a useful purpose to briefly examine the testimony of the various witnesses.

BANKRUPT.

Henry Barkschat stated unequivocally that he had no interest in any recovery that Barber might receive from the Doheny estate. [Rec. 47.] He stated that his connection with Barber's affairs was that of a relative trying to obtain a settlement for him. [Rec. 50.] Barber had lived with the bankrupt and his first wife for a number

of years, during which period they looked after him. [Rec. 48.] He further testified that his first wife brought Barber to Hatter, who had been an old friend of the family. [Rec. 45.] According to his testimony, the only other activity he entered into was in recommending the employment of the law firm of Williamson, Ramsay & Hoge in lieu of Massey & Edgington. [Rec. 45, 49.]

The bankrupt went on to state that he had attempted to impress Hatter with the thought that he should participate in the recovery, which Hatter agreed to do, and which agreement appears in the original contract of employment. [Rec. 49.]

Th bankrupt stated that at some time subsequent to the execution of the employment agreement he informed Barber of the fact that he was to receive one-half (½) of Hatter's fee. [Rec. 49.] He testified that Barber remonstrated with him and stated that he didn't think he should get anything as a relative, but felt that Doris Barkschat, who had been kind to him, should receive a portion of whatever might be recovered. [Rec. 49, 50.] The result of this talk between the bankrupt and Barber was the execution of the assignment by Hatter of one-half (½) of his interest in the Doheny estate to appellant. [Rec. 49.] The bankrupt further testified that at the time of the assignment from Hatter to appellant he did not contemplate going into bankruptcy [Rec. 51]; that he never had any agreement with his wife to receive any part of the Barber money; that during the time Barber lived in the Barkschat home, the appellant, from her own money and income, was maintaining the household and that the house in which they lived was owned by her. [Rec. 51.]

His verbatim testimony is clear and lucid:

"There was nothing in writing between me and Mr. Hatter that I know of. I told Mr. Hatter that all my interest should go over to my wife, because William Barber wished it so, because he wanted to show his appreciation of what she had done for him. At that time I did not contemplate going into bankruptcy. I have never had possession of that money, or any part of it. I have never deposited it in my name anywhere, nor drawn a check against any part of it. I never considered that money, or any part of it, as mine.

"I do not have any agreement that when the bankruptcy matters are concluded that Doris Barkschat will turn over to me or deliver to me any part of this money. Doris Barkschat was not employed during the period William Barber lived in our home or at any other time to my knowledge. I was not supplying the funds for the necessary household expenses but Mrs. Barkschat did from her own money, her own income; I was not earning anything. This house was not mine; she owns it and acquired it before her marriage to me with her own funds." [Rec. 50, 51.]

HATTER.

The record discloses that Hatter was obviously a hostile witness to appellant. He testified that the bankrupt had requested him to destroy the original agreement dated December 2, 1932 [Rec. 65]; and it is undoubtedly true that this testimony was not very helpful to appellant in the Lower Court. Nevertheless, Hatter was unable to testify to more than the mere identification of the original exhibits. On matters that are of paramount importance to the determination of the issue here involved, Hatter's testimony is silent. He stated that he made the assign-

ment of one-half (½) of what he was to receive from the Doheny estate in favor of Doris Barkschat because he was requested to so do. [Rec. 11.] As an example of the undue weight which was given to the Hatter's testimony below, the following portion thereof is set forth:

> "Mr. Barber did not at any time tell me that he wanted Barkschat cut out of this contract—that he felt that Barkschat had no right to recover any part of it. Mr. Barber did not at any time tell me that he wanted such portion as Barkschat was to have had under the original document, Trustee's Exhibit 1, to go to Mrs. Doris Barkschat. He wouldn't do that because Mr. Barkschat worked on the case also and did very good work. I cannot say definitely that at any time Mr. Barkschat himself told me that he wanted any moneys that might have been coming to him transferred or paid to any other person. I wouldn't say definitely at this time;—I could not say." [Rec. 99.]

It will readily appear to this Court that the foregoing testimony involves the conclusions and opinions of the witness and is entirely negative in character. Its weight must be entirely disregarded in the presence of positive testimony.

BARBER.

Barber stated that he did not remember the execution of the original agreement whereby he employed Hatter and Barkschat to represent him in the establishment of his paternity. [Rec. 87.] He stated that he recalled a conversation which took place approximately a year before the date of his testifying to the effect that he wanted Mrs. Barkschat to receive whatever portion of the Doheny money he had agreed to give to Barkschat. [Rec. 87.]

Barber went on to testify that the bankrupt told him that he had a one-half (½) interest in Hatter's share of the settlement [Rec. 89] to which he replied that he didn't think he deserved it; that he had promised Doris Barkschat something should he win the case for the reason that she had done a number of favors for him. [Rec. 89.] He further stated that when he made the foregoing statement to Barkschat that Barkschat acquiesced therein. [Rec. 93.] He went on to say that he felt that he ought to give Mrs. Barkschat a substantial amount because she had befriended him when he was down and out; that she had fed him, given him clothes and given him money for two years. [Rec. 93.] His explanation for the amount he had decided to give her is stated as follows:

> "I gave her the identical sum of money that I gave to Mr. Hatter simply because that is what Henry Barkschat said that he had coming from the outfit." [Rec. 92.]

His testimony is very strong and clear to the effect that he objected to the bankrupt's receiving anything and that the bankrupt acquiesced in this.

The following excerpt from the record is helpful:

> "I stated that I had a conversation about a year ago with Henry Barkschat at which time I asked him to turn over to Doris Barkschat the half interest that he had in Mr. Hatter's contract. I didn't know that he had any interest. I asked him to assign his half interest to Mrs. Barkschat because he told me he had it. I didn't ask him upon what he based that right. That conversation took place at Doris Barkschat's home. Whenever I was in Los Angeles that was my home. I couldn't say how much time in the last two

years I spent in Los Angeles. I have been there a week at a time and sometimes I would be gone for a month or two and at one time I spent over three months there. That was after Christmas, 1936, until April 8, 1937, when this settlement of the estate matter was effected. All of that time I lived at Doris Barkschat's and Henry Barkschat's residence." [Rec. 93.]

APPELLANT.

Mrs. Barkschat, testifying in her own behalf, stated that she had known Barber since the first part of 1935 when he had come to live with her and that she had taken care of him ever since. [Rec. 81.] She testified that the house in which she, Barber and Barkschat lived was her own property and that she took care of the maintenance thereof out of her own income. [Rec. 81.] That she had not charged Barber board for the obvious reason that he didn't have a cent. [Rec. 81.] She stated that the first time that she had any knowledge that Barber intended to give her anything out of the Doheny estate was after he had lived with them for some time. [Rec. 81, 82.] She stated that she had no knowledge of any kind that her husband, the bankrupt, had any contract or understanding of any nature, kind or character whereby he was to receive anything out of the Doheny settlement. [Rec. 82.] The first time she had knowledge of any such agreement was at the hearing at which he testified below. [Rec. 83.] She further stated that at the time she received the money, her husband had never discussed with her the question of

going into bankruptcy; that she received the money and treated it as her own; that the same had never been in possession of her husband and that she based her claim of ownership on the fact that she took care of Barber, supported him and gave him money when he had nothing of his own and that it was his wish that she have it. She stated that after she received the money she spent some of it. She bought herself an automobile and treated the money as her own. [Rec. 83, 84.]

THE ISSUES THUS PRESENTED.

It will be noted that all of the witnesses who had any knowledge concerning the money that went to the appellant are in agreement in their testimony to the effect that appellant had no knowledge of the original Barber-Hatter-Barschat agreement. We are not concerned here with the question of a preference or fraudulent conveyance but we are faced with the problem as to whether or not Doris Barkschat is entitled to defend the claims made against her by the appellee in a plenary suit before a jury. If the record discloses that her interest in the money in question is colorable only, then the Lower Court was correct is sustaining the exercise of summary jurisdiction by the Referee in Bankruptcy. But if the claim of Doris Barkschat is an adverse claim, made in good faith, then the Lower Court erred and she is entitled to defend her rights in a plenary action before a jury.

SPECIFICATION OF ASSIGNED ERRORS RELIED UPON ON THIS APPEAL.

1. The District Court erred in ordering, in effect, by its said order of February 3, 1938, that said Doris Barkschat forthwith turn over to Frank M. Chichester, as trustee in the above entitled matter, the sum of $11,250.00, and be enjoined and restrained from transferring, assigning or turning over said sum, or any part thereof, or any property acquired thereby, to any person whomsoever other than said trustee. [Assignment of Errors Number (2), Rec. 110.]

2. The District Court erred in ordering, in effect, that it had jurisdiction to make and enter its said order of February 3, 1938, and that the Referee had jurisdiction to adjudicate in a summary proceeding the controversy in reference to the possession, control and ownership of the money in question, because the evidence shows that the Referee and said District Court was without jurisdiction to adjudicate such controversy, it appearing conclusively from such evidence that appellant's claim to the money in question was substantial and adverse and she was in exclusive possession thereof at the time of the filing of the petition in bankruptcy by the bankrupt, and that she, at all times, objected to the consideration of her rights and the subject matter of said money in a summary proceeding. [Assignment of Errors Number (3), Rec. 111.]

3. The said Referee had no jurisdiction, without the consent of appellant, which was expressly withheld, to make and enter his said order dated October 6, 1937, ordering and decreeing that said Doris Barkschat turn over to the trustee herein, forthwith, the sum of $11,250.00, received by said Doris Barkschat, as agent for, and for the account of, the bankrupt

herein, Henry Barkschat, on or about April 8, 1937, and enjoining and restraining her from transferring, assigning or turning over said sum, or any portion thereof, or any property acquired thereby, to any person whomsoever other than said trustee. [Assignment of Errors Number 4, Rec. 111.]

4. That the Referee erred in overruling the objections of this appellant to the summary jurisdiction of said Referee. [Assignment of Errors Number (4)-(b), Rec. 112.]

5. That said Referee erred in overruling the demurrer and objections of appellant to the petition of the trustee for turnover order. [Assignment of Errors Number (4)-(c), Rec. 112.]

6. That the Referee erred in finding that at the time of the adjudication of the bankrupt the possession of said $11,250.00 was in the bankrupt; that said finding is not supported by the evidence and is contrary to law. [Assignment of Errors Number (4)-(g), Rec. 113.]

7. That the finding of the court below that appellant's claim of the ownership of the funds in controversy is merely colorable was erroneous in that there was no evidence to support such finding. [Assignment of Errors Number 4-(h), Rec. 113.]

8. That the lower court had no jurisdiction to make the order complained of. [Assignment of Errors Number 4-(j), Rec. 113.]

9. That the court below exceeded its jurisdiction in passing upon the merits of appellant's claim without her consent. [Assignment of Errors Number 4-(l), Rec. 114.]

10. That the court below had no jurisdiction to pass upon the weight of the evidence given by the

appellant and other witnesses in face of her objection to the jurisdiction of said court. [Assignment of Errors Number 4-(m), Rec. 115.]

11. The Referee erred, and was without jurisdiction without the consent of appellant which was expressly withheld, when he proceeded to and did determine the merits of appellant's claim and made his findings and conclusions of law and his said order dated October 6, 1937, after the preliminary investigation conducted by him had brought out the sworn testimony, to the effect in substance that said money was paid to appellant prior to the bankrupt's filing of the petition in bankruptcy herein, and was received and held by her as her sole and separate property, and at all times since then claimed to be her sole and separate property; that her claim to title thereto was derived from one William Barber, a stranger to the proceedings herein, and not the bankrupt, and that the said William Barber caused said money to be transferred to her in pursuance to a promise previously made by him so to do in return for the care, support and moneys theretofore furnished said William Barber by her; that she had no knowledge of any of the transactions and agreements existing between said bankrupt, said William Barber and said Charles V. Hatter until the hearing before said Referee; that said bankrupt had never had possession of the money, or any part of it, and never considered it, or any part of it, as his money, and that he had no agreement with said Doris Barkschat that when the bankruptcy matters were concluded she would turn over or deliver to him said money, or any part of it, because said sworn testimony conclusively showed that appellant was an adverse claimant. [Assignment of Errors Number (4)-(l), Rec. 114.]

SUMMARY OF POINTS AND AUTHORITIES.

I. In order to exercise summary jurisdiction, there must be a *res* in the actual or constructive jurisdiction of the bankruptcy court.

Taubel v. Fox, 264 U. S. 426, 68 L. Ed. 770;
In re Freitas, 16 Fed. Supp. 557;
In re Club New Yorker, 14 Fed. Supp. 694;
Buss v. Long Island Storage Co., 64 Fed. (2d) 338;
Central Republic Bank & Trust Co. v. Caldwell, 58 Fed. (2d) 721.

(a) An adverse claim is not colorable if it is substantial.

Adolph Ramish v. Laugharn, 86 Fed. (2d) 686;
In re Bastanchury Corporation, 62 Fed. (2d) 537;
Weidhorn v. Levy, 253 U. S. 268, 64 L. Ed. 898;
Buss v. Long Island Storage Co., 64 Fed. (2d) 338;
In re Flynn, 300 Fed. 693.

II. In determining whether a claim is adverse or simply colorable, the bankruptcy court cannot disregard uncontradicted sworn testimony.

In re Goldstein & Moseson, 216 Fed. 887;
Matter of Yorkville Coal Co., 211 Fed. 619.

III. The Referee's findings are wholly unsupported by the evidence.

Adolph Ramish v. Laugharn, 86 Fed. (2d) 686;
In re Flynn, 300 Fed. 693;
In re Goldstein & Moseson, 216 Fed. 887.

IV. Both the Referee and the District Court acted in excess of jurisdiction.

Harrison v. Chamberlain, 271 U. S. 191, 70 L. Ed. 897;
5 *Remington on Bankruptcy* 234;
Matter of Midtown Contracting Co., 243 Fed. 56;
Matter of Yorkville Coal Co., 211 Fed. 619.

ARGUMENT.

I.

In Order to Exercise Summary Jurisdiction, There Must Be a Res in the Actual or Constructive Jurisdiction of the Bankruptcy Court.

The following Assignments of Error are directed to this point:

> 1. The District Court erred in ordering, in effect, by its said order of February 3, 1938, that said Doris Barkschat forthwith turn over to Frank M. Chichester, as trustee in the above entitled matter, the sum of $11,250.00, and be enjoined and restrained from transferring, assigning or turning over said sum, or any part thereof, or any property acquired thereby, to any person whomsoever other than said trustee. [Assignment of Errors Number (2), Rec. 110.]
>
> 2. The District Court erred in ordering, in effect, that it had jurisdiction to make and enter its said order of February 3, 1938, and that the Referee had jurisdiction to adjudicate in a summary proceeding the controversy in reference to the possession, control and ownership of the money in question, because the evidence shows that the Referee and said District Court was without jurisdiction to adjudicate such controversy, it appearing conclusively from such evidence that appellant's claim to the money in question was substantial and adverse and she was in exclusive possession thereof at the time of the filing of the petition in bankruptcy by the bankrupt, and that she, at all times, objected to the consideration of her rights and the subject matter of said money in a summary proceeding. [Assignment of Errors Number (3), Rec. 111.]

3. The said Referee had no jurisdiction, without the consent of appellant, which was expressly withheld, to make and enter his said order dated October 6, 1937, ordering and decreeing that said Doris Barkschat turn over to the trustee herein, forthwith, the sum of $11,250.00, received by said Doris Barkschat as agent for, and for the account of, the bankrupt herein, Henry Barkschat, on or about April 8, 1937, and enjoining and restraining her from transferring, assigning or turning over said sum, or any portion thereof, or any property acquired thereby, to any person whomsoever other than said trustee. [Assignment of Errors Number 4, Rec. 111.]

4. That the Referee erred in overruling the objections of this appellant to the summary jurisdiction of said Referee. [Assignment of Errors Number (4)-(b), Rec. 112.]

The above stated rule of law is basic and fundamental.

Taubel v. Fox, 264 U. S. 426, 68 L. Ed. 770;

In re Freitas, 16 Fed. Supp. 557;

In re Club New Yorker, 14 Fed. Supp. 694;

Buss v. Long Island Storage Co., 64 Fed. (2d) 338.

The applicability of the rule to cases of constructive possession is stated by the Supreme Court of the United States in *Taubel v. Fox,* 264 U. S. 426, 68 L. Ed. 770:

"The possession, which was thus essential to jurisdiction, need not be actual. Constructive possession is sufficient. It exists where the property was in the physical possession of the debtor at the time of the filing of the petition in bankruptcy, but was not delivered by him to the trustee, where the property was delivered to the trustee, but was thereafter wrongfully withdrawn from his custody; where the property

> is in the hands of the bankrupt's agent or bailee; where the property is held by some other person, who makes no claim to it; and where the property is held by one who makes a claim, but the claim is colorable only." (l. c. 432.)

It is true that the bankruptcy court cannot be ousted of summary jurisdiction by a mere objection setting forth that the *res* is not in the actual or constructive possession of its trustee. The law gives the Referee the right to conduct a preliminary inquiry in order to determine whether or not jurisdiction lies. It was said in *Central Republic Bank & Trust Co. v. Caldwell,* 58 Fed. (2d) 721:

> "Construing these various statutory provisions as to the court wherein, and the character of proceeding (summary or plenary) whereby, the title to and rights in property adversely claimed may be adjudicated, several rules have been definitely stated: First, the bankruptcy court always has jurisdiction, as a preliminary inquiry, to determine its own jurisdiction to proceed to examine and decide, in a summary proceeding, the merits of an adverse claim; second, the bankruptcy court has jurisdiction to examine and decide adverse claims if it has possession of the disputed property. If the preliminary examination as to the existence of jurisdiction develops that such possession is present, the bankruptcy court can determine the merits in the summary proceeding before it; if such examination develops that such possession is not present, the bankruptcy court can proceed no further, but must leave the merits to be determined in a plenary action brought in a court designated in sections 23, 60b, 67e, or 70e, of the Bankruptcy Act, as may be applicable." (l. c. 730.)

A. An Adverse Claim Is Not Colorable if It Is Substantial.

The following Assignments of Error are involved in this proposition:

> 5. That said Referee erred in overruling the demurrer and objections of appellant to the petition of the trustee for turnover order. [Assignment of Errors Number (4)-(c), Rec. 112.]
>
> 7. That the finding of the court below that appellant's claim of the ownership of the funds in controversy is merely colorable was erroneous in that there was no evidence to support such finding. [Assignment of Errors Number 4-(h), Rec. 113.]
>
> 8. That the lower court had no jurisdiction to make the order complained of. [Assignment of Errors Number 4-(j), Rec. 113.]
>
> 9. That the court below exceeded its jurisdiction in passing upon the merits of appellant's claim without her consent. [Assignment of Errors Number 4-(l), Rec. 114.]

As has already been seen, the bankruptcy court has jurisdiction if the possession of the *res* is actually or constructively in the trustee. The border-line cases attempt to define a "colorable" adverse claim. It has been said that if the claim is a mere sham or pretense it is colorable. On the other hand, if the claim is substantial, entirely aside from its merits, the claim is adverse and summary jurisdiction does not lie.

Adolph Ramish v. Laugharn, 86 Fed. (2d) 619, is determinative of the issues here presented to the Court. The bankrupt, Behr, made a transfer of certain royalty interests to one Myers, his attorney; these interests were

then assigned by Myers to a corporation which the Court, in that case, described as *"wholly owned and controlled by Behr through 'dummy' officers and directors."* (Opinion, p. 688.) The corporation then transferred these interests to appellant. The Referee, in a summary proceeding for turnover, found that these transfers were engineered by the bankrupt for the purpose of hindering, delaying and defrauding his creditors, and with the purpose of preferring appellant to his other creditors, and that appellant had knowledge thereof. The Referee accordingly made his turnover order. On review, this order was affirmed. This Court reversed the order, holding that the corporation, being a separate entity, claimed to hold the property in its own right and not as an agent for Behr, was a real and substantial adverse claim, not merely colorable, and summary proceedings were not authorized. This Court also stated that "since the bankrupt no longer had possession on the filing of his petition, except on the disputed claim of the Properties Company's character as *alter ego* of the bankrupt, the bankruptcy court cannot, without consent, adjudicate the controversy concerning the title to the royalty."

See, also:

In re Bastanchury Corporation, 62 Fed. (2d) 537.

In the case at bar we find that the appellant has met every test fixed in the *Ramish* case *(supra)* by:

1. Having received the money from a *stranger* and not the bankrupt.

2. Having acquired it several months *prior* to bankruptcy.
3. Having maintained possession of the fund at all times—it never was in the bankrupt's possession.
4. Having acquired title through Barber rather than the bankrupt.
5. Having objected to the summary jurisdiction of the Referee.

We submit that the facts of the instant case are stronger than those found in the *Ramish* case *(supra)* for here appellant had no knowledge of the bankrupt's alleged interest in the fund.

Weidhorn v. Levy, 253 U. S. 268, 64 L. Ed. 898, is also illuminating. It holds that summary jurisdiction does not lie against a third person to set aside a fraudulent transfer or conveyance. The Court there stated:

> "Thus, if the property were in the custody of the bankruptcy court or its officer, any controversy raised by an adverse claimant setting up a title to or lien upon it might be determined on summary proceedings in the bankruptcy court, and would fall within the jurisdiction of the referee. (Citing cases.)
>
> "But in the present instance the controversy related to property not in the possession or control of the court or of the bankrupt, or anyone representing him at the time of petition filed, and not in the court's custody at the time of the controversy, but in the actual possession of the bankrupt's brother under an adverse claim of ownership based upon conveyances

made more than four months before the institution of the proceeding in bankruptcy. In order to set aside these conveyances and subject the property to the administration of the court of bankruptcy a plenary suit was necessary (Babbitt v. Dutcher, 216 U. S. 102, 113, 54 L. Ed. 402, 406, 30 Sup. Ct. Rep. 372), and such was the nature of the one that was instituted." (l. c. 271, 272.)

Likewise in *Buss v. Long Island Storage Warehouse Co.*, 64 Fed. (2d) 338 (C. C. A. N. Y.), it was said:

"This situation forbad the bankruptcy court to take summary jurisdiction at all. The power over a bankrupt's estate depends primarily on actual custody, like that of any other court that proceeds *in rem.* Having taken hold of the property, it may award it to whom it thinks lawful, and other courts will recognize the interests so decreed. However, its power is not limited to goods of which it has actual custody through its officer; a marshal, a receiver, or a trustee. It may also seize summarily other goods, which are in that case said to be 'constructively' in its possession at the time the petition was filed. The underlying condition upon this incidental power is that the property must be in the possession of one who acknowledges that he holds it subject to the bankrupt's demand. Such a bailee, making no claim of interest, is subject to the orders of the bankruptcy court as such. Mueller v. Nugent, 184 U. S. 1, 22 S. Ct. 269, 46 L. Ed. 405; Babbitt v. Dutcher, 216 U. S. 102, 30 S. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969; Taubel etc. Co. v. Fox, 264 U. S. 426, 432, 433, 44

S. Ct. 396, 68 L. Ed. 770. Further, the court will examine even an adverse claim of the bailee, so far as to determine whether it is patently absurd or made in bad faith, 'colorable' only." (l. c. 339.)

The factual situation in *In re Flynn,* 300 Fed. 693, closely parallels that of the case at bar. There, on motion of the trustee, the bankrupt's wife was ordered to turn over money and property alleged to belong to the bankrupt estate. The wife asserted ownership in herself of the property claimed by the trustee. The Circuit Court of Appeals disposed of the situation by stating:

"From the certificate of the referee it clearly appears that the petitioner was an adverse claimant of the deposits and other personal property standing in her name, and of the real estate to which she held the title, and that the right of the trustee to a transfer of these deposits and personal property and of a conveyance of the real estate to him can only be determined by a plenary suit in equity to which the petitioner is made a party, and that the referee was without jurisdiction in a summary proceeding to enter an order in regard to the same.

"The order of the District Court, confirming the order of the referee, is hereby reversed, with costs to the petitioner in this court, and the case is remanded to the District Court, with direction to enter an order dismissing the petition of the trustee for want of jurisdiction so far as it relates to personal property claimed by Josephine M. Flynn or real estate to which she has the legal title." (l. c. 696.)

II.

In Determining Whether a Claim Is Adverse or Simply Colorable, the Bankruptcy Court Cannot Disregard Uncontradicted Sworn Testimony.

The following Assignment of Error is involved in this point:

> 10. That the court below had no jurisdiction to pass upon the weight of the evidence given by the appellant and other witnesses in face of her objection to the jurisdiction of said court. [Assignment of Errors Number 4-(m), Rec. 115.]

In re Goldstein & Moseson, 216 Fed. 887 (C. C. A., 7th Cir.), succinctly states the rule:

> "The District Court may pursue the summary method to the point of ascertaining that the alleged adverse claim is substantial and not merely colorable. But substantially appears as soon as the claimant, in response to the rule to show cause, presents his verified answer, which is unmet by the trustee, or which, if met by a replication, is supported by sworn testimony of facts, which, if true, would show title and possession antedating the petition in bankruptcy. A conclusion that the alleged adverse claim is a cover for the claimant's possession as agent or bailee of the bankrupt cannot be permitted to be reached by the District Court's rejection of the sworn answer and testimony, and thereupon finding that the alleged adverse claim is fraudulent. That end can only be attained if it is the just conclusion of a due trial of a plenary suit." (l. c. 888.)

In the case at bar, the preliminary investigation disclosed facts which might form the basis of an adverse

claim so as to send it to trial in a plenary suit. When those facts were disclosed, the purpose of the preliminary investigation was accomplished, and the inquiry should have then been brought to a close.

The facts disclosing that the appellant's adverse claim was real and substantial were adduced when it was testified that:

(a) Respondent received the money prior to the adjudication in bankruptcy;

(b) It was received pursuant to Exhibit 3, from a stranger to the proceedings, to-wit: Hatter;

(c) Respondent claimed ownership thereof as a grant from Barber to her, pursuant to his promise to pay her for the services, kindnesses and moneys she had given and furnished to him;

(d) From the bankrupt's uncontradicted testimony that he did not own any part of the money and did not expect to receive any part of it from the appellant;

(e) The presumption, which constitutes evidence in a case, found in Section 164 of the Civil Code of the State of California, to the effect that whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired by a married woman by an instrument in writing, is that the same is her separate property. In this case the appellant, a married woman, acquired the fund involved in her own name by virtue of an instrument in writing, to-wit: Exhibit 3, the assignment to her from Hatter.

When the above facts were brought out in the preliminary investigation, the Referee lost jurisdiction to proceed any further and had no right to try the claim upon the

merits, to weigh testimony against testimony, and to find certain testimony to be true and certain testimony not to be true. That would be to deny the parties the right to a trial before a jury. (*Matter of Yorkville Coal Company,* 211 Fed. 619 (C. C. A. N. Y.).) The Referee should have declined to adjudicate the merits of the claim; that is, ownership of the money, even though he thought the claim founded on false testimony, fraudulent and void. *(Matter of Yorkville Coal Company, supra.)*

III.

The Referee's Findings Are Wholly Unsupported by the Evidence.

This proposition involves this Assigned Error:

> 6. That the Referee erred in finding that at the time of the adjudication of the bankrupt, the possession of said $11,250.00 was in the bankrupt; that said finding is not supported by the evidence and is contrary to law. [Assignment of Errors Number (4)-(g), Rec. 113.]

The Referee duly filed a certificate setting forth that two questions were presented by the review: (1) Whether the facts warranted the exercise of summary jurisdiction and (2) whether the evidence justified the finding that the sum of $11,250.00 was constructively within the possession of the trustee in bankruptcy.

The Referee set forth his summary of the evidence. He outlined the Hatter-Barkschat-Barber agreement of December 2, 1932, and made the finding that services were rendered by the bankrupt pursuant to the terms of said contract. [Rec. 28.]

In fairness to this appellant, the Referee should have indicated that no substantial services were performed by the bankrupt unless it be considered that his knowledge of the Doheny family background was the rendition of a service. Realistically viewed, the only thing the bankrupt did of value for Barber was to accompany him to Hatter's office on a number of occasions and later to recommend the employment of a firm of attorneys. We challenge this finding of the Referee, if the inference that he desires drawn from his finding is that the bankrupt rendered services to Barber of a value equivalent to $11,250.00.

The Referee further set forth in his certificate the agreement dated March 23, 1936, Respondent's Exhibit A, and in reference thereto states that the bankrupt was not mentioned in said agreement but goes on to make the finding "that it was agreed and at all times understood . . . that Henry Barkschat . . . was to receive one-half of whatever Hatter got under the terms of the last two mentioned contracts. . . ." [Rec. 29.] He went on to find that "the contract of December 2, 1932, Trustee's Exhibit Number 1, had never been cancelled, but had only been modified as to percentage, and that Hatter always understood that Henry Barkschat, the bankrupt herein, was to get one-half of whatever Hatter received under said agreement." [Rec. 30.]

We respectfully submit that the foregoing finding finds no support whatever in the record. It is true that Hatter testified concerning what he *understood* but that was his conclusion. The persons who had knowledge of the transaction testified that the agreement of cancellation meant what it said; and Barber, who was the real party in interest, at all times asserted that Barkschat was to get nothing out of the Doheny settlement.

The Referee further stated that there is "no conflict of evidence." [Rec. 34.] In this we agree with him for the record shows:

(a) That Barber never intended the bankrupt to receive anything for his aid in establishing the paternity issue.

(b) That Barber had no recollection of the original agreement of December 2, 1932.

(c) That Doris Barkschat at all times had no knowledge of her husband's supposed interest in the Doheny estate.

(d) That Hatter's only interest was in the recovery of his own fee for his services—that he had no knowledge concerning the disposition of the proceeds of the settlement but was merely testifying from his own conclusions —his testimony is entirely negative for he frankly stated that neither Barber nor Barkschat had ever discussed with him the moneys that ultimately went to Doris Barkschat; that he signed the assignment to Doris Barkschat because he was requested to so do and asked no questions concerning the same.

(e) That Doris Barkschat out of her own funds supported Barber for a period of time and rendered various kindnesses to him when he was unable to take care of himself.

(f) That Doris Barkschat actually received the money in question some months prior to the adjudication in bankruptcy; knew nothing of the impending bankruptcy and at all times dealt with the money as her own.

(g) That Henry Barkschat never made any claim to the money, never had anything to do with the handling of

it, and had no agreement concerning any part of the same with his wife.

Based on all of the foregoing, the Referee stated: "From these facts there was no other conclusion the Referee could draw but that this money involved belonged to the bankrupt, Henry Barkschat, and was turned over to his wife at his request and as a matter of convenience." [Rec. 34.] We submit that in making the foregoing findings the Referee in Bankruptcy was flying in the face of every decision which has considered a factual situation similar to the one at bar.

Adolph Ramish v. Laugharn, 86 Fed. (2d) 686;
In Re Flynn, 300 Fed. 693.

Further, the Referee proceeded to disregard uncontradicted sworn testimony. This he was not entitled to do.

In re Goldstein & Moseson, 216 Fed. 887.

We submit that the Referee's findings of fact [Rec. 35] to the effect that the money in question was turned over to appellant as the agent of the bankrupt is wholly unsupported by any evidence and that the only inference that can be drawn from the testimony is that Doris Barkschat's claim is an adverse one. We are not, in an inquiry of this sort, concerned with the ultimate merits of the controversy. It may be that in a plenary suit a jury will find that Doris Barkschat's adverse claim to the funds in question is not well taken, but that is an entirely different situation. We submit that the Referee erred when he did not find that Doris Barkschat was entitled to defend her claims in a plenary proceeding.

In re Goldstein & Moseson, 216 Fed. 887.

IV.

Both the Referee and the District Court Acted in Excess of Jurisdiction.

Assigned Error Number 11 raises this question:

> 11. The Referee erred, and was without jurisdiction without the consent of appellant which was expressly withheld, when he proceeded to and did determine the merits of appellant's claim and made his findings and conclusions of law and his said order dated October 6, 1937, after the preliminary investigation conducted by him had brought out the sworn testimony, to the effect in substance that said money was paid to appellant prior to the bankrupt's filing of the petition in bankruptcy herein, and was received and held by her as her sole and separate property, and at all times since then claimed to be her sole and separate property; that her claim to title thereto was derived from one William Barber, a stranger to the proceedings herein, and not the bankrupt, and that the said William Barber caused said money to be transferred to her in pursuance to a promise previously made by him so to do in return for the care, support and moneys theretofore furnished said William Barber by her; that she had no knowledge of any of the transactions and agreements existing between said bankrupt, said William Barber and said Charles V. Hatter until the hearing before said Referee; that said bankrupt had never had possession of the money, or any part of it, and never considered it, or any part of it, as his money, and that he had no agreement with said Doris Barkschat that when the bankruptcy matters were concluded she would turn over or deliver to him said money, or any part of it, because said sworn testimony conclusively showed that appellant was an adverse claimant. [Assignment of Errors Number (4)-(1), Rec. 114.]

While appellant could have vested jurisdiction below to determine the merits of her claims, this she expressly refused to do. [Rec. 9, 11.] She not only demurred to the trustee's petition on jurisdictional grounds, but also answered, again repeating her objections to the exercise of summary jurisdiction. As very clearly appears from the record, the property of which the trustee sought to divest appellant came into her possession prior to the adjudication in bankruptcy; by demurring to the petition of the trustee, the Referee's function was limited to conducting a mere preliminary inquiry for the purpose of determining whether he had jurisdiction to pass upon the petition thus presented to him. In so doing, the law gave him no right to determine the merits of the controversy, nor to weigh the testimony of the witnesses for the purpose of ascertaining the truth. His function was a simple one—he was called upon to answer this question: Did Doris Barkschat, the appellant herein, claim the property in question adversely to the estate or was she holding by virtue of a mere sham or pretense.

In *Harrison v. Chamberlain,* 70 L. Ed. 897, 271 U. S. 191, the trustee in bankruptcy filed a petition for a summary order, requiring the respondent, a stranger to the proceeding, to deliver to him certain money in her possession which, he alleged, was the property of the bankrupt, held by her fraudulently and without color or claim of title. She filed a demurrer for want of jurisdiction in the court to proceed summarily. This was overruled. She then answered, asserting that the money was her individual property, acquired and held by her in good faith, and renewing her jurisdictional objection. The Referee, upon the evidence, reported that the respondent's claim was based on fraud and was merely colorable; and that the

money was an asset of the estate and subject to the summary jurisdiction of the Court. The District Judge confirmed the report and entered an order in accordance therewith. On appeal, the Supreme Court in said case, in laying down the test for determining whether an adverse claim was substantial or merely colorable, stated:

> ". . . We are of the opinion that it is to be deemed of a substantial character when the claimant's contention 'discloses a contested matter of right, involving some fair doubt and reasonable room for controversy' (Board of Education v. Leary, *supra*) in matters either of fact or law; and is not to be held merely colorable unless the preliminary inquiry shows that it is so unsubstantial and obviously insufficient, either in fact or law, as to be plainly without color or merit, and a mere pretense." (l. c. 195.)

The Supreme Court thereupon affirmed the decree of the Circuit Court of Appeals, which had reversed the District Court.

Remington on Bankruptcy, Volume 5, page 234, states the rule by quoting from *Matter of Midtown Contracting Co.,* 243 Fed. 56, as follows:

> "The test is not the existence or nonexistence of disputed facts; simply bcause the only dispute is over questions of law does not confer jurisdiction. The facts, to be sure, may be undisputed, but that is not enough. If they also show that some one other than the bankrupt, or his undisputed agent is in possession, and is in possession under a claim of right, summary process will not lie, whether the claim of right be sound in law or not."

In the *Matter of the Yorkville Coal Company,* 211 Fed. 619, the rule that we were contending for is clearly stated:

> "A claim is not adverse if it merely consists in a refusal to turn over property to the trustee, but it is not prevented from being adverse because it is based on false testimony or originates in a fraudulent transaction." (l. c. 620.)

A very cogent explanation of the rule applicable to the case at bar appears in the Court's decision of the *Matter of Yorkville Coal Co.* (*supra*):

> "We think the court below fell into error through its misapprehension of the decision of the Supreme Court in Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269, 7 A. B. R. 224. In that case the court held that the bankruptcy court had jurisdiction in a summary proceeding to ascertain whether there was any basis for an adverse claim actually existing at the time of the filing of the petition, or whether the claim was merely 'colorable.' The court below evidently thought that, in order to determine whether the claim asserted by Tarrulli and Sandquist was colorable, it had the right to determine whether the claim was a fraudulent one, based on false testimony and not worthy of credence. This certainly was not the meaning of the Supreme Court. The court said that the bankruptcy court acts within its jurisdiction in a summary proceeding in entering into an inquiry to find whether there is any basis in fact in support of a party's contention that he is an adverse claimant. It is to find out whether the claim is merely colorable, or whether it is 'real, even though fraudulent and voidable.' And if the claim is real, even though it may be fraudulent and void-

able, the court must decline to finally adjudicate on the merits. An adverse claim, in other words, does not fall short of being real because the court thinks it is founded on false testimony and is fraudulent and voidable. It should be noted that in the Nugent case no adverse claim to the cash in question was made by the respondent at any time until after the decision of the District Court, when he asked to amend his pleading by asserting that he held the money not as the agent of the bankrupt, but adversely to him. Leave to amend was refused, a disposition of the matter which the Supreme Court held to be within the discretion of the district judge at that state of the case and not reviewable. The Supreme Court, moreover, said of the proposed amendment that it 'did not even then set forth what money he had received, and how and when it came to his hands, or the circumstances under which he claimed to hold it adversely, but put forward simply a conclusion of law.'

"The case at bar is materially different. The claim of Tarrulli and Sandquist in this proceeding is a real adverse claim. That it may be found ultimately to be fraudulent and voidable is not at all material at this stage of the proceedings. The basis of an adverse claim is disclosed by the testimony when it is of such a nature that, if submitted in a court and no evidence is offered in contradiction, it would be sufficient to support a judgment in favor of the claimant. A claim is not adverse if it consists merely in a refusal to turn over property to the trustee, but it is not prevented from being adverse because it is based on false testimony, or originates in a fraudulent transaction." (l. c. 621.)

We could go on enumerating many other authorities to the same effect but believe that the citations quoted above are sufficient to establish that the Referee acted in excess of his jurisdiction. Every witness who appeared before him, with the possible exception of Hatter, testified that appellant asserted her claim to the money in question which she received from Barber and not the bankrupt, and proceeded to deal with it as her own. Both she and Barber stated that the consideration for the transfer to her arose out of the kindnesses she extended to him. As already point out, Hatter's testimony was entirely negative; stripping his conclusions from the record, he had no knowledge concerning the relation of the parties. We submit that in the present well settled state of the law, despite the Referee's personal feeling that the transaction was fraudulent, he should have held that he was without jurisdiction to adjudicate the merits of the controversy upon the disclosure of the factual situation upon which the above Assignment of Error is based.

Conclusion.

The facts here presented indicate a clear abuse of jurisdiction by the bankruptcy court. We ask the Court to bear in mind that this appeal does not involve the merits of Doris Barkschat's claim to the money in question. It does involve her right to defend her claims before a jury in a plenary action, rather than to have a Referee in bankruptcy, who himself is interested in the enhancement of the estate, pass upon the good faith of her claim. To

hold that her possession of the funds was constructive involves the violation of every rule of logic for the simple reason that she received the money prior to the adjudication and proceeded to deal with it as her own. For the Referee to reject the uncontradicted testimony of every witness in order to draw the inference that his Court was the proper forum for the administration of the money involved is, to say the least, a vast abuse of a summary jurisdiction. This Court in a number of well decided cases has clearly defined the limits of summary jurisdiction. We submit that the *Ramish* case (*supra*) is clearly decisive and determinative of this matter. There, the factual situation was not as impelling as the one at bar but the principle is the same.

It is respectfully submitted that the order appealed from should be reversed with costs to appellant.

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No. 8986

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

DORIS BARKSCHAT,

Appellant,

vs.

FRANK M. CHICHESTER, Trustee in Bankruptcy,

Appellee.

BRIEF FOR APPELLEE.

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TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

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DORIS BARKSCHAT,

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BRIEF FOR APPELLEE.

Statement of the Case.

This is an appeal from an order in the bankruptcy proceeding of one Henry Barkschat [Tr. 5] requiring the said bankrupt and his wife, Doris Barkschat, the appellant, to turn over to the appellee, as Trustee in Bankruptcy of the Estate of Henry Barkschat, Bankrupt, the sum of $11,250.00 as an asset of said estate.

Specifically this appeal is from an order of the District Court entered February 3, 1938 [Tr. 39], in which the District Judge, upon review, sustained an order of a Referee in Bankruptcy [Tr. 16] requiring the turnover as stated.

The Questions Presented.

The questions presented are set forth in the Referee's certificate on petition for review [Tr. 26], and may be stated thus:

1. Were the District Judge and the Referee correct in holding, under the facts in this case on the evidence presented herein, that the bankruptcy court had jurisdiction summarily to require the appellant, Doris Barkschat, to turn over to the bankrupt estate of her husband the money involved?

2. Were the District Judge and the Referee correct in holding under the evidence in this matter that said money was in the constructive possession of the bankrupt at the time of the filing of the petition in bankruptcy, and consequently was in the constructive possession of the trustee herein?

The summary jurisdiction of the bankruptcy court in this matter upon which the answer to the first question depends is determined by the answer to the second question—the question of constructive possession of the money involved. In other words, as stated in the brief for appellant, at page 13, under the heading "The Issues Thus Presented":

> "If the record discloses that her interest in the money in question is colorable only, then the lower court was correct in sustaining the exercise of summary jurisdiction by the Referee in Bankruptcy."

The answer to the said questions, therefore, depends upon the facts involved, as appears from the evidence in the record.

The Evidence.

As required by General Order XXVII the Referee upon the review of his order in this matter certified to the District Judge a "Summary of the Evidence," as found in the transcript of record on appeal at page 28.

In addition thereto the Referee forwarded to the District Judge a transcript of the entire testimony taken in the proceeding, which has been incorporated, mostly in narrative form, in the transcript of record, beginning on page 43.

Appellant in her brief sets forth, beginning on page 4, her view of the evidence, which is a very different statement from that found in the Referee's "Summary of the Evidence." [Tr. 28.]

Of course, since this whole matter is essentially a question of fact, appellant is entitled to argue her view of the evidence. It would unduly extend this brief to again detail the evidence as set forth in the Referee's summary thereof. [Tr. 28.]

The appellant has not asserted, either in her assignment of errors or in her brief, that the said Referee's summary of the evidence [Tr. 28] was erroneous in any particular. Appellant apparently disagrees only with the Referee's "Conclusions From the Evidence" [Tr. 34], and the findings, conclusions and turnover order following, as well as the District Judge's conclusions, as set forth in the minute order of February 3, 1938. [Tr. 39.] But in support of her arguments appellant makes her own conclusions from the evidence. The only answer is the statement of evidence itself, which is incorporated in the transcript of record. [Tr. 43.]

Argument.

The alleged "adverse claim" of appellant is colorable only and a mere pretense. Both the District Judge and the Referee so conclude from the evidence presented.

The law on the questions presented is so well settled that little need be said in that regard. As already stated, appellant admits that if her "adverse claim" is colorable only, the decisions below of the District Judge and the Referee were correct. (Brief for Appellant, p. 13.)

The conclusion of the District Judge is stated in his minute order [Tr. 39]:

> "The money in question was at all times the property of the bankrupt, and its purported transfer to Doris Barkschat was palpably a pretended transfer only. Her claim of ownership had no substantial basis whatever. . . ."
>
> "It seems to me, therefore, that it is 'so unsubstantial and obviously insufficient, either in fact or law, as to be palpably without color of merit and a mere pretense,' within the meaning expressed in Harrison v. Chamberlin, 271 U. S. 191, 195."

The Referee states his views in his "Conclusions From the Evidence" [Tr. 34], supporting his conclusions by reference to the evidence on which they are based.

We submit an impartial review of the statement of evidence [Tr. 43] can hardly lead to any other conclusion.

There is no doubt that appellant attempts to assert an "adverse claim." But the mere assertion of it is not proof

of it. It must be remembered that all the witnesses, except Hatter, were adverse to the trustee. And to a considerable extent Hatter was reluctant to testify.

The bankrupt at first denied ever having any connection with Barber, or any contract or any agreement of any kind with him. This was under examination under section 21a of the Bankruptcy Act. In this proceeding the bankrupt reiterated his said testimony. [Tr. 46.] He was very specific in his testimony that he did not enter into any agreement with Barber by which he was to profit in any way. [Tr. 47.] Apparently the bankrupt did not then know the trustee was in possession of the agreement, Trustee's Exhibit 1. [Tr. 55.] It was only when the document was being shown to the attorneys for the bankrupt and Doris Barkschat [Tr. 51] and was later introduced in evidence, that the bankrupt admitted such an agreement with Barber.

Later on the bankrupt, in attempting to explain Hatter's testimony regarding destruction of the documents, stated as his own version of that incident that if the first agreement, apparently Trustee's Exhibit 1 [Tr. 55], was ever found, "that it would just ruin me." [Tr. 76.] Now if the transfer of the Barber money to Doris Barkschat was a real transfer, why would any knowledge of the document (Trustee's Exhibit 1) coming to the trustee mean ruin to Barkschat? Unless the transfer of said funds was a mere cover-up.

As a practical matter it is impossible for the trustee, appellee, in this matter to present in this brief an ex-

tended argument on the evidence and the facts, due to lack of sufficient funds in the estate to cover extended printing. The appellee sincerely requests, if the court doubts the validity of the rulings below, that the statement of evidence [Tr. 43] be reviewed. And as a final word of argument the following observations are presented:

The cases cited by appellant in her brief are so far from the facts involved here that they can hardly be said to be in point in support of appellant's position.

In both courts below the trustee, appellee, relied upon the statements of the Supreme Court in the case of *Harrison v. Chamberlin,* 271 U. S. 191.

At no place in the record does it appear that the bankrupt *gave* the money in question to his wife, the appellant.

Hatter made the assignment to appellant [Tr. 60]; but it was not his money. He did not give her the money. He said he transferred it to Doris Barkschat because it didn't matter to him, Hatter, who got the 50% covered by the contract, Trustee's Exhibit 2 [Tr. 58], that belonged to the bankrupt, and the assignment was "satisfactory to all concerned." [Tr. 101-102.]

Barber did not give the money to Mrs. Barkschat. He testified that he did not give her any of the money he got out of the settlement. [Tr. 94.] He did not demand that Hatter relinquish 50% of his contract. The testimony is that Barber did not want Henry Barkschat to have any of it because he was a relative so he wanted Henry to assign it to Doris.

The whole story just does not ring true. The evidence, taken as a whole, leads only to the conclusion that the money was placed in the hands of the wife to escape the creditors. She even says she keeps it in cash at home. She doesn't trust banks. But most significant, the bankrupt does not ever anywhere in his testimony state that he *gave* the money to his wife. He is the only one who could have had any right to it. But he never permitted himself to be put in a position where he could have been charged with relinquishing his right to that money. He was pacifying Barber, so he says, but he wasn't loosening his claim on the money. The wife apparently, from the evidence, was merely holding it for him.

It is respectfully submitted that the order appealed from should be affirmed with costs to appellee.

IGNATIUS F. PARKER,
Attorney for Appellee.

No.....

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILSE A. NIELSON,

Appellant,

vs.

UTAH CONSTRUCTION COMPANY,
a corporation,

Appellee.

Transcript of the Record

On Appeal from the District Court of the United States for the District of Idaho, Southern Division.

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On Appeal from the District Court of the United States for the District of Idaho, Southern Division.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

ALBERT E. BOWEN,
Salt Lake City, Utah,
EDWIN SNOW,
Boise, Idaho,
Attorneys for ~~Appellant~~ appellee.

D. A. SKEEN,
Salt Lake City, Utah,
Attorney for Appellant.

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INDEX (Continued)

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE DISTRICT OF IDAHO, EASTERN DIVISION.

UTAH CONSTRUCTION COMPANY,
a corporation,

Plaintiff,

vs.

JOHN F. ABBOTT, et al.,

Defendants.

WILSE A. NIELSON,

Petitioner.

IN EQUITY.
No. 222.

PETITION
Filed February 23, 1937.

The petition of Wilse A. Nielson respectfully shows to the Court:

1. That he is the owner of the following described real estate, situated in Butte County, State of Idaho, to-wit:

> The Northeast quarter of Section 12, Township 3 North, Range 26 East Boise Meridian, and the East half of the Northwest quarter and Lots 1 and 2 of Section 7, Township 3 North, Range 27 E. B. M.

That in the above entitled action, on or about the 15th day of March, 1923, a decree was entered by the terms of which decree it was provided, among other things, that

there was adjudicated to the said land as appurtenant thereto of the waters of Big Lost River, in Butte County, Idaho, 6.4 second feet of water, with a priority as of June 1, 1890, the said water "to be diverted from Big Lost River through the Miller Ditch, having its point of diversion in the Southwest quarter of Section 1, Township 3 North, Range 26 E.B.M., for the irrigation of the following described land, to-wit:

> The Northeast quarter of Section 12, Township 3 North, Range 26 E.B.M., and the East half of the Northwest quarter, and Lots 1 and 2 of Section 7, Township 3 North, Range 27 E.B.M."

2. That by the terms of the said decree, it was further provided that "the court hereby expressly reserves jurisdiction to supervise and enforce the administration of this decree hereafter and from time to time as occasion may require." It is further provided by the terms of said decree that all rights granted to the plaintiff were "subject to such prior rights as are herein decreed in the order of their respective priorities. * * * Said plaintiff, Utah Construction Company, has a right to divert at its point of diversion hereafter stated, and to impound at its reservoir (known as the Mackay Reservoir) or in part to divert and in part to impound at said reservoir all the waters of Big Lost River and its tributaries to the extent of 2300 cubic feet per second of time according to the dates of priority hereafter set forth, the water stored in said reservoir to be thereafter released from said reservoir at plaintiff's pleasure through the gates of the Mackay Res-

ervoir Dam and thence down the natural channel of Big Lost River for use at the following points of diversion * * *" And further, "in its exercise of the rights herein defined, the plaintiff may, to the extent of its various appropriations, as hereinafter decreed, impound in storage and divert the waters of Big Lost River at all times, and at all seasons of the year when by so doing it does not interfere with the exercise of any prior rights fixed by this decree, and the water released by it from storage may be conveyed through the natural channel of the river, and shall be protected under the provisions of this decree for the distribution designated by plaintiff as though kept and conveyed within an artificial channel."

3. That pursuant to the terms of said decree, the waters of Lost River were stored in part and used by the said Utah Construction Company and for a time the water decreed to the land above described as now owned by petitioner was supplied thereto through the natural channel of the said Big Lost River, and the diversion gate of the Miller Ditch, as specified by said decree.

4. That the petitioner acquired the said land and the water decreed thereto and entered into possession of the said land and proceeded to farm the same, after said decree was entered, and in reliance thereon. That in the administration of the said decree a water commissioner was appointed. That in the further course of the administration of said decree, controversies arose between other landowners involved in the said decree, and the Utah Construction Company, and on or about 1929 the Utah

Construction Company, through the said water commissioner, and in violation of the terms of the said decree, caused large quantities of water previously owned and decreed to the land of the petitioner, and the petitioner herein and other persons owning land and water along the channel of the said Big Lost River near and below Arco, Idaho, to be stored and wrongfully diverted to the lands of the plaintiff and other lands controlled by the plaintiff under the Carey Act Project, to which the plaintiff was given the right, under certain conditions, to divert and deliver the said water. That by reason of the said wrongful storage and diversion of the waters of the Big Lost River, in disregard of the rights of the petitioner herein, the water which had been, by said decree, decreed to petitioner and others similarly situated, was taken away from petitioner's said land and the water level in and around the petitioner's said land was lowered, the land and streams dried up, and the crops growing and planted thereon were destroyed and the petitioner was greatly damaged.

5. That the said wrongful use, diversion and storage of water by the plaintiff, Utah Construction Company, and for its benefit, continued, and the crops planted by petitioner were destroyed each year during the years 1930, 1931, 1932, 1933, 1934 and 1935, all over the protest of the petitioner. That during the year 1934 under the direction of said Utah Constrution Company, and for its benefit, the said wrongful diversion continued, and in the year 1935, the said Utah Construction Company and the

said water commissioner, acting under its direction and for its benefit, caused the entire flow of the waters of Big Lost River below the said Mackay Dam, to be diverted from the channel of said Lost River, into the ditches of the Utah Construction Company and on to its lands, and from petitioner's ditches and land, and taken and withheld from entering or flowing down the said channel of the said Big Lost River, so that the river bed of the said Big Lost River, which was the channel designated in said decree as the source of petitioner's water supply and point of diversion from said Big Lost River near the petitioner's property became wholly dried up, the vegetation on and along the said river and on petitioner's property was dried up, died and was destroyed, and the crops and vegetation growing on said ground was destroyed, and the petitioner suffered damage by reason thereof.

6. That during the year 1935, the Big Lost River Irrigation District, a public corporation of the State of Idaho, entered into some agreement or arrangement with the Utah Construction Company, the terms of which are not known or understood by the petitioner, but under which the said Big Lost River Irrigation District and its officers and agents intend to evade the said decree and to wrongfully divert the water decreed to petitioner's land and sell and distribute the same to others whose decreed rights are inferior to petitioners, or who have no rights under said decree.

7. That petitioner is informed and believes, and, on

such information and belief, alleges that the said Utah Construction Company intends to, and unless enjoined by this Court, will ignore and disregard said decree, and the priority of rights fixed thereby, and will attempt to coerce and compel the petitioner and others similarly situated whose lands are not within, but are wholly without the jurisdiction of said Big Lost River Irrigation District, to enter the said lands within the said District, and submit to the domination and control of the said Big Lost River Irrigation District, or as a condition to the petitioner obtaining his rights and priorities to the waters of the said Big Lost River, as decreed and ordered distributed to him under said decree and by reason thereof, the said officers and agents are acting in violation of the said decree, as is well known and understood by the said Big Lost River Irrigation District officers and the Utah Construction Company.

8. That the petitioner has made repeated appeals to the said officers and directors of the said Big Lost River Irrigation District and to the Utah Construction Company to deliver water to his said land in accordance with the said decree for the purpose of saving the said crops from loss and destruction. That the said Big Lost River Irrigation District and its said officers and agents, as petitioner is further informed and believes, and therefore alleges the fact to be, have entered into some further agreement with the said plaintiff, Utah Construction Company, to protect the said Utah Construction Company against damages resulting from the violation of

the said decree and have further agreed to take the said water decreed to the Utah Construction Company subject to prior rights including the rights of the petitioner and divert them from the lands to which they were decreed, and transport them to other lands and other territory and to sell the said water to individuals having no decreed rights thereto or rights of a later priority than petitioner, all in violation of the terms of the said decree. That all of the said acts are in violation of the terms of the said decree, and are unwarranted in law, and by reason of the said combination and agreement seeking to relieve the said Utah Construction Company from responsibility, the protective provisions of the said decree afforded to this petitioner and others similarly situated, are being nullified and destroyed.

9. That the petitioner during 1936 had growing upwards of 150 acres of grain and alfalfa crops. That he was unable to procure any water in the manner specified by the said decree, and the said crops growing thereon were wholly destroyed and lost to this petitioner. That there has at all times been ample water stored and flowing in the said Big Lost River system if permitted to flow in its usual and natural course, as conditions existed at the time the decree herein was entered, and under which the water duties and necessities were determined at the time of the entry of the said decree, to fully comply with the terms of the said decree as affecting the petitioner's said land, and to fully irrigate and mature the crops growing thereon and to protect the petitioner from the loss of

the said crops. That by reason of the wrongful acts hereinabove set out and committed, the petitioner has been damaged in an amount in excess of $10,000.00. That petitioner has spent large sums of money in preparing ground and has crops planted and is ready to plant crops for the season of 1937. That plaintiff threatens to continue to violate the terms of said decree and are now diverting and threaten to continue to divert water decreed to petitioner, and will divert petitioner's water and destroy the crops, unless this court make and enter an order directing the delivery forthwith to this petitioner of the water decreed to him by said decree, all in accordance with the decree, which water, under conditions existing, is ample to irrigate the petitioner's said land, and raise and mature the crops thereon, and the said crops now planted and crops to be planted in the coming season will be wholly destroyed and the petitioner will sustain a further damage in excess of $2500.00.

WHEREFORE petitioner prays that upon the reading of this verified petition that the Court make and enter an order directing the plaintiff herein and its officers and agents to appear before this court at a time and place specified by the court to show cause why they have not complied with the terms and provisions of said decree as the same affected the property of this petitioner as described in said petition, and why they have not permitted, and are not now permitting sufficient water of the flow of Big Lost River to flow in the channel of said Big

Lost River so as to reach the Miller ditch intake on said river as specified in said decree and to flow to and upon the petitioner's land in accordance with the terms of said decree.

2. Petitioner prays for an order fixing a time and place of hearing for the determination of the claims of the petitioner herein for damages sustained in the loss of crops by reason of the wrongful diversion and use by the plaintiff, Utah Construction Company, and for its benefit of the water decreed to petitioner herein, which waters were owned by petitioner and of which petitioner was deprived since the entry of the said decree, and that upon such determination being made, that the petitioner herein be given judgment accordingly against Utah Construction Company.

3. Petitioner further prays that any other landowner to whom water was decreed for particular land, or his successor in interest, may be permitted to come in and join in this petition, upon his offering to pay, or paying, his proportionate share of the expenses of the filing and of a hearing on this petition, and that on final hearing herein, the Court make and enter such orders as are proper and necessary to the further administration of the said decree and the distribution of the waters thereunder, according to the terms of said decree.

4. Petitioner prays for such other and further or-

ders and relief herein as in the premises may be proper, including his costs incurred herein.

JOHN A. CARVER
FRANK GRIFFIN
D. A. SKEEN,
Attorneys for Petitioner.

Verified by Wilse A. Nielson
January 30, 1937.
Vivian S. Fox, Notary Public

(Title of Court and Cause)

ORDER
Filed February 23, 1937

Wilse A. Nielson having filed herein a verified petition praying for an order requiring plaintiff herein, Utah Construction Company, a corporation, to show cause why it has not complied with the terms and provisions of the decree entered herein, granting to the plaintiff, Utah Construction Company, permission to store and divert waters of the Big Lost River, and why they have not permitted waters of the Big Lost River to flow in the channel of said stream so as to protect the decreed rights of the petitioner herein, and his predecessor in interest, and praying for an order fixing the time and place of hear-

ing for determination of claims of the petitioner herein for damages sustained in the loss of crops by reason of the alleged wrongful diversion and use of water previously decreed to plaintiff herein, and, good cause appearing therefor,

IT IS NOW THEREFORE, ORDERED that plaintiff, Utah Construction Company, be and appear before this Court at Pocatello on the 22 day of March, 1937, at ten o'clock A.M., to show cause, if any it has, why the prayer of said petition should not be granted.

Dated this 23rd day of February, 1937.

BY THE COURT:

CHARLES C. CAVANAH,
Judge.

(Service acknowledged February 23, 1937.

(Title of Court and Cause)

AMENDED ANSWER.
Filed Mar. 26, 1937

Comes now the Utah Construction Company, the plaintiff above named, and answering to the petition of Wilse A. Nielson, admits, denies and alleges:—

1. Admits the allegations in paragraph 1 of said petition contained.

2. Admits that by the terms of said decree the reservation of jurisdiction was made as set out in paragraph 2, and in this connection further alleges that the court further reserved jurisdiction by the terms of said decree to appoint commissioners to carry out the execution and administration thereof, and that in the exercise of such jurisdiction the court did appoint commissioners to administer said decree during each and every year since the entry thereof, to and including the year 1936, and during each and every of said years and during all of the times since the entry of said decree to the end of the year 1936, the same was administered by a Commissioner appointed and directed by this Court, and the waters of Big Lost River were distributed to the parties entitled under said decree by and through the commissioner of the Court so appointed and acting. The court further reserved jurisdiction under the terms of said decree to discharge its commissioner at any time and to turn the administration of said decree over to the officer of the State of Idaho having jurisdiction over the administration of the public waters of the State, and that in the exercise of said jurisdiction the Court, prior to the filing of the petition herein, did discharge its said comissioner and did turn the administration of said decree over to the commissioner of reclamation of the State of Idaho, and said commissioner of reclamation has assumed jurisdiction of the administration of said decree and has appointed a water master or commissioner under him to administer it and to distribute the waters among those entitled thereto ac-

cording to the terms and provisions of said decree. It is further provided in said decree that any party thereto may at any time make application to a commissioner or water master appointed to administer it, to have the waters to which he is entitled distributed to him strictly in accordance with the terms and provisions of the decree, and that upon the failure of such commissioner or water master to comply with said requirement, application might be made to the court for directions. In this connection the Utah Construction Company alleges that it is informed and believes, and therefore says, that the petitioner herein has not made application to any commissioner or water master charged with the administration of said decree, to have the waters of Big Lost River distributed in accordance with the terms of the decree.

Admits that by the terms of said decree the Utah Construction Company was granted rights as in paragraph 2 of said petition set forth, but in this connection further alleges that during all the times between the first day of November of each year and the first day of May of the next succeeding year, the Utah Construction Company was given a prior and superior right to all other parties to store in its reservoir all of the waters of Big Lost River except 50 second feet thereof, and was given the right under conditions in said decree specified, and subject to the discretion of the commissioner charged with the administration of said decree, to store waters of Big Lost River in its said reservoir during the month of October of each year.

3. Admits that pursuant to the terms of said decree the waters of Big Lost River were stored in part and used by the Utah Construction Company all strictly in accordance with the terms and provisions of said decree, and the Utah Construction Company further alleges that it is without knowledge as to whether the water decreed to petitioner's land was supplied through the natural channel of Big Lost River and the diversion gate of the Miller Ditch.

4. Answering to paragraph 4 of said petition the Utah Construction Company admits that in the administration of said decree a water commissioner was appointed. Denies that on or about the year 1929, or at any other time or at all, the Utah Construction Company, through said water commissioner, or otherwise, or at all, or in violation of the terms of the decree, caused large or any quantities of water previously owned and decreed to the land of the petitioner, or other persons owning land and water along the channel of Big Lost River, near and below Arco, Idaho, or at any other place, or at all, to be stored and wrongfully diverted to its lands or to other lands controlled by it under the Carey Act Project or otherwise; denies that by reason of wongful or any storage and diversion of waters of Big Lost River or in disregard of the rights of the petitioner herein, any waters which had been by the decree herein decreed to petitioner, or others similarly situated, was taken away from petitioner's land and that the water level in and around the petitioner's land was lowered, the land and

streams dried up and the crops growing and planted thereon destroyed and the petitioner damaged.

5. Denies that by wrongful or any other use, diversion and storage of water by the Utah Construction Company, crops planted by petitioner were destroyed in any of the years 1930, 1931, 1932, 1933, 1934, or 1935, either over the protest of the petitioner or otherwise or at all. Denies that during the year 1934, under the direction of the Utah Construction Company, or for its benefit, or otherwise, or at all, wrongful diversion of the waters of Big Lost River continued or occured, and denies that in the year 1935, or at any other time, or at all, the Utah Construction Company and the water commissioner, either acting under its direction or for its benefit, or otherwise, or at all, caused the entire or any of the flow of the waters of Big Lost River below the said Mackay Dam, to be diverted from the channel of said river into the ditches of the Utah Construction Company and on to its lands and away from the petitioner's ditches and lands, and took and withheld the same from entering and flowing down the channel of the Big Lost River, and that by reason thereof the river bed of the said Big Lost River became wholly dried up at the petitioner's point of diversion at or near his said described premises, or the vegetation along the river and on petitioner's land was dried up and died and destroyed and that the crops and vegetation growing thereon were destroyed and that the petitioner suffered damage by reason thereof or at all.

6. Denies that during the year 1935, or at any other time, or at all the Big Lost River Irrigation District entered into any agreement or arrangement with the Utah Construction Company by the terms whereof the said Big Lost River Irrigation District and its officers and agents, or either of them, intend to evade the decree herein and wrongfully to divert waters decreed to the petitioner's land and sell and distribute the same to others whose decreed rights are inferior to petitioner's and have no rights under said decree. Denies that the Utah Construction Company intends to or will, unless enjoined by the court, ignore or disregard the decree herein or the priority of rights fixed thereby, or will attempt to coerce or compel the petitioner or others similarly situated, whose lands are not within but are wholly without the jurisdiction of said Big Lost River Irrigation District, or whether said lands are in or out of said Irrigation District, to enter the said lands within the said District or to submit to the domination and control thereof, or that as a condition to the petitioner obtaining his rights and priorities to the waters of Big Lost River, as decreed and ordered distributed to him under the decree herein, the officers and agents, or any or either of them, are acting or will act in violation of the said decree either as understood by the Big Lost River Irrigation District or the Utah Construction Company, or otherwise, or at all.

7. Answering to paragraph 8 of said petition the Utah Construction Company says that it is without knowledge as to whether petitioner has made repeated

or any appeals to the officers and directors of the Big Lost River Irrigation District, and denies that any such appeals have been made to the Utah Construction Company to deliver water to petitioner's lands either in accordance with the terms of said decree, or otherwise, or at all, for the purpose of saving the said crops from loss and destruction or for any other reason or purpose. Denies that the Big Lost River Irrigation District, its officers or agents, have entered into any agreement with the Utah Construction Company to protect the Utah Construction Company against damages resulting from the violation of the decree herein, and denies that by said alleged agreement, or otherwise, or at all, the said Big Lost River Irrigation District has agreed to take water decreed to the Utah Consruction Company subject to prior rights of the petitioner and divert them from lands to which they were decreed and transport them to other lands and other territory, or to sell the said waters to individuals having no decreed rights or to any other person or to persons with rights of later priority than petitioner, either in violation of the terms of the decree, or otherwise, or at all. Denies that any of the uses of the Utah Construction Company have been or are in violation of the terms of the decree herein or are unwarranted in law. Denies that by reason of the said or any combination and agreement, either seeking to relieve the Utah Construction Company from responsibility, or otherwise, or at all, the protective provisions of the decree afforded the petitioner, or others, are being nullified and destroyed. De-

nies that any such agreement, as is alleged in said paragraph 8, has ever been entered into between the Utah Construction Company and the Big Lost River Irrigation District.

8. Answering to paragraph 9 of the petition herein the Utah Construction Company says that it is without information as to whether during the year 1936, the petitioner had growing upwards of 150 acres of grain and alfalfa crops, and is likewise without knowledge as to whether the petitioner was able to procure water in the manner specified by said decree, or as to whether the crops growing on plaintiff's land were wholly or at all lost to the petitioner. Denies that petitioner has at any time been entitled to the water stored in the reservoir of the Utah Construction Company, and denies that there was or has been at all times ample water flowing in the Big Lost River system if permitted to flow in its usual and natural course as conditions existed at the time the decree herein was entered to fully comply with the terms of the decree as affecting the petitioner's land, or to fully irrigate or mature the crops growing thereon or to protect the petitioner from the loss of his crops, and in this connection alleges that during the years in the petition herein set forth there had been great and unprecedented drouth and lack of precipitation in the water shed supplying the said Big Lost River, by reason whereof the quantities of water wont to flow therein have been greatly diminished. Denies that by reason of the wrongful or other acts of the Utah Construction Company the peti-

tioner has been damaged in any amount in excess of $10,000.00, or any other sum or amount. The Utah Construction Company is without knowledge as to whether petitioner has spent large or any sums of money in preparing grounds, and as to whether he has crops planted or is ready to plant crops for the season of 1937. Denies that the Utah Construction Company threatens to or will violate the terms of said decree, and denies that it is now diverting or threatens to continue to divert water decreed to the petitioner, and denies that it will divert petitioner's water or destroy his crops unless the court make an order directing the delivery forthwith or otherwise, or at all, to the petitioner of the water decreed to him by said decree. As to whether there will be sufficient water to which the petitioner is entitled to mature his crops for the year 1937, either those now planted or to be planted, the Utah Construction Company is without knowledge, and is likewise without knowledge as to whether petitioner's crops during the year 1937 will be injured or destroyed or that petitioner will suffer any damage.

Further answering to said petition and as further defenses thereto the Utah Construction Company alleges:—

1. That about the month of July, 1936, it sold and by deed conveyed and delivered to the Big Lost River Irrigation District all of its right, title and interest in and to the waters of Big Lost River, its Mackay Dam and reservoir and all canals used in connection therewith, and all of its Carey Act lands and rights in the Big Lost River

Carey Act Project, and all of its rights, as fixed by the decree herein in and to the use of the waters of the Big Lost River, and that the Utah Construction Company does not have or claim to have any right, title or interest under said decree or otherwise in or to the waters or use of the waters of said Big Lost River, and does not now store or use nor intend in the future to store or use any of said waters, and has no interest whatsoever in or under the decree herein.

2. If by his said petition the petitioner herein seeks to recover from the Utah Construction Company, damages for alleged injuries to crops during the years 1929, 1930, 1931, 1932, and 1933, then, said alleged claim or claims is, and are, barred by the provisions of Sec. 5224, Chapter 2 of the Idaho Code Annotated, 1932.

3. That continuously ever since the entry of the decree herein on March 15, 1923, and during each and every year from 1923 to 1936, both years, inclusive, the said decree has been construed and interpreted by the Commissioners appointed by the Court to administer it and by all of the parties to it as awarding to the Utah Construction Company for storage in its reservoir, all of the flow of Big Lost River, except fifty cubic feet per second, thereof, during the period from November 1st of each year to April 20th or May 1st of each year, as the Commissioner under the provisions of the decree might determine, of the next succeeding year, and as entitling the Utah Construction Company, and its successors and assigns, to, and awarding to it, and them, the exclusive

right to the use of all the said storage water, as stored or released from storage, less the loss in transit fixed by said decree, and 34 cubic feet per second of water arising in said reservoir. And the said decree has, during all of said period, of time, been so administered, and such administration has been acquiesced in by all the parties to said decree, including petitioner and his predecessor in interest, and lands irrigated from said Big Lost River and from said storage water and the water rights connected therewith or appurtenant thereto, have been sold and purchased and large sums of money expended thereon on reliance on the said construction and interpretation and administration of said decree, and petitioner is now estopped to question the said rights, and the interpretation and administration of said decree; and by reason of long acquiescence and laches petitioner is barred from asserting that the waters of Big Lost River may not be stored and released from storage and used, and the decree administered as is herein stated.

WHEREFORE, the Utah Construction Company prays that the petition of the petitioner herein may be dismissed, and that it have and recover against the petitioner its costs herein expended, and that it have such other and further relief as is proper in the premises.

A. E. Bowen, Salt Lake City, Utah
Edwin Snow, Boise, Idaho,
Solicitors for plaintiff above named, the Utah Construction Company.

(Duly verified)

(Title of Court and Cause)

REPLY TO AMENDED ANSWER

Filed Mar. 26, 1937

Comes now the petitioner herein and by way of reply to the further answer and further defense set out in the plaintiff's Amended Answer, admits, denies and alleges as follows:

Denies each and every allegation in the Amended Answer, except as heretofore admitted or otherwise contraverted in this reply and in the petition heretofore filed.

This petitioner denies that continuously and ever since the entry of the Decree herein, the Decree has been by him construed or interpreted so as to permit or authorize the Utah Construction Company to take from the flow of Big Lost River, or any of its tributaries, any of the water at any time in such a manner as to infringe upon or interfere with the rights of this petitioner as decreed to him in the said Decree, and in this connection the petitioner alleges that the waters in Lost River, as conditions existed at the time of the entry of the said Decree and prior thereto, consisted of the underflow of waters down and adjacent to the channel of the said stream and coming into the bed of said stream from springs and other tributaries and through the natural seepage of water from the sides and along and underneath the bed of said stream; that by reason of the length of the channel

of the said Big Lost River and its tributaries above this petitioner's diversion ditch, the diversion of small quantities of water above and at and near the said Mackay Dam would not influence or affect the flow of the waters or the water table levels on the petitioner's property and at the intake of the said Miller ditch for a considerable period of time; that as soon as the diversion and change of the flow and course of the stream and the storage of the waters thereof by the Utah Construction Company appeared to show any effect upon the water table and the waters in the stream at the head of the petitioner's said ditch, he protested and has ever since continued to protest to the Commissioner and to the Utah Construction Company, its officers and agents, and this petitioner has never countenanced or acquiesced in the interpretation and administration of the said decree as now claimed by the said Water Commissioner and the Utah Construction Company, or at all.

WHEREFORE, petitioner prays that the plaintiff take nothing by its said affirmative answer and further defense and that petitioner be given relief as in his original petition herein prayed.

D. A. SKEEN,

J. A. CARVER,

FRANK GRIFFIN,

Attorneys for Petitioner.

(Duly verified)

(Title of Court and Cause)

OPINION
Filed July 7, 1937

A. E. Bowen, Salt Lake City, Utah
Edwin Snow, Boise, Idaho,
George L. Ambrose, Mackay, Idaho,
Attorneys for the Plaintiff

D. A. Skeen, Salt Lake City, Utah,
J. A. Carver, Boise, Idaho,
Frank Griffin, Boise, Idaho,
Attorneys for Petitioner.

July 7, 1937

CAVANAH, District Judge.

In March 1923, a decree of this Court was entered adjudicating rights to the use of the waters of Big Lost River in Idaho, and in which the rights of the Utah Construction Company and the petitioner, Wilse A. Nielsen, were determined. There was decreed to the Company the right to divert water from the flow of the river and Antelope Creek, for storage, power, irrigation and domestic purposes, of dates of priority which are subsequent to the priority of the petitioner, at the head of the Blaine Canal, the Arco Canal and other point or points of diversion which may be established by the Company. There was decreed to the predecessor in interest of the petitioner 6.4 C F S water of the natural flow of

the river of a priority prior to the decreed rights of the Company, to divert through the Miller ditch, having its point of diversion on the River. The first point of diversion of the Company is about nineteen miles up stream from the point of diversion of the petitioner.

The present controversy is over the charge of the petitioner in his petition for Order to Show Cause, that the Company and the water Commissioner appointed by the Court, to administer the decree, have in violation of the terms of the decree, caused large quantities of water, previously owned and decreed to the land of the petitioner, to be stored and wrongfully diverted to the lands of the company and others, which resulted in depriving the petitioner and others similarly situated of their water. The charge is further made that by reason of such wrongful diversion and storage, the crops of the petitioner were destroyed during the years 1930 to 1935 inclusive. Beginning with the irrigation season of 1935 the Big Lost River Irrigation District, a Public Corporation entered into a lease with the Company by the terms of which the District, as lessee, thereafter operated the property of the Company, and thereafter in July 1936, a deed of conveyance of all of the property and water rights of the Company was executed to the District.

The petitioner now asserts in his brief that he had under the evidence, ample water to irrigate his land from the main channel of the River from the time the Company entered upon the stream to and including the year 1932, and that the water table on his and adjacent lands

until that time was near the surface, and since then has lowered. So the inquiry here is, as far as any alleged damage is concerned, and the affect of diverting the natural flow of the river through points of diversion of the company, must relate to the years 1933 and 1934, as far as the company is concerned. It will be observed that the decree provides: " . . . . From and after November 1st, of each calendar year to the beginning of the subsequent irrigation season, to-wit, May 1st, (or such earlier date as said Commissioner or other official may determine water to be necessary for irrigation purposes, but in no event earlier than April 20th), said plaintiff shall have the right to store in its said reservoir all the waters flowing at that point in Big Lost River. Provided, however, that plaintiff shall at no time by closing its gates for storage purposes at said reservoir, reduce the amount of water flowing in Big Lost River to a quantity less than fifty (50) cubic feet per second of time measured at said 2-B gauge. And the plaintiff's right so to store said water for said period to the extent herein defined is hereby adjudged and decreed to be superior to the rights of any defendant during said period, and such storage and the subsequent use of said stored water, by sale, rental or otherwise by said plaintiff will in no way infringe upon any prior right of any of said defendants thereto . . . . "

The principal dispute therefore is, whether the Company had diverted a part of the natural flow of the water of the river into its reservoir and at times diverted it into

its Blaine Canal and through by-pass and canals which intercepts water that otherwise contribute to the supply necessary to reach petitioner's land, and fill his right at the Miller ditch intake in the channel of the River. The decree is clear that when in storing and diverting the natural flow of the River by the Company it must not do so in any manner as will in any way infringe upon any prior right of the petitioner, who has a prior vested right, nor has the Commissioner or any one else any authority or right to disregard the terms of the decree. At times, commencing with the irrigation season of 1933, the Commissioner and the Company, have, and until it finally transferred its holdings to the District, diverted water from the reservoir and the natural flow of the river at points of diversion above the petitioner's point of diversion. The decree does not authorize that to be done, if it results in decreasing the natural flow of the main channel of the River to such an extent as to prevent the flowing down the main channel of the river, a sufficient amount of water to supply petitioner's prior right. The fact that the decree permits the Company to release storage water at its pleasure from the reservoir for use at the head of the Blaine Canal and Arco Canal or any other point or points of diversion which it may establish, does not give to it, or the Commissioner the right or authority to divert the natural flow of the main channel of the River above petitioner's intake on the river, when it is shown that in doing so it interferes with and prevents petitioner's right from being supplied. In determining what

is the natural inflow from the River to the Company's reservoir the decree provides: ". . . . . the natural flow and increment to Big Lost River between what are known as the "A" line gauging stations at the upper end of plaintiff's reservoir and what is known as the 2-B gauge below said reservoir, and located in the Northeast quarter of Section 18, Township 7 North, Range 24 East B. M., is thirty four (34) cubic feet per second and in determining what constitutes the natural flow of Big Lost River, with reference to the storing of water by plaintiff in its reservoir and the release of waters therefrom, the water flowing in said Big Lost River and measured by the "a" line gauging stations at the upper end of said reservoir, plus thirty-four (34) cubic feet per second measured at the 2-B gauge aforesaid, shall be deemed the natural flow of said stream at said 2-B gauge, and any amount in excess of such natural flow shall be deemed released stored waters . . . . . "

It then seems clear that by that provision of the decree the natural flow and increment of the river at 2-B gauge below the reservoir is 34 cubic feet per second, and in determining what constitutes the natural flow of the river with reference to the storing of water by the Company in its reservoir and the release of waters therefrom, the water flowing in the river is measured by the "A" line gauging station at the upper end of the reservoir plus 34 cubic feet per second, measured at the 2-B gauge shall be the natural flow of the stream at the 2-B gauge,

and any amount in excess of such natural flow shall be released stored water.

After then considering the provisions of the decree which are pertinent to our inquiry, we are confronted with the interpretation of the statute and constitution of the State, by the Supreme Court of the State of Idaho, relative to the rights of prior appropriators of public waters when in diverting water from a stream or its tributaries by subsequent appropriators, it is self-evident that to divert water from a stream must in a large measure, diminish the volume of water in the main stream and that it would take more than a theory, and require clear and convincing evidence in a given case showing that the prior appropriator would not be injured or affected by the diversion by subsequent appropriators. This principle was announced by the Idaho Supreme Court in the case of Moe v. Harger 10 Idaho 302, 77 Pac. 645, which related to the same stream we are now considering and the physical conditions involved here are set forth and discussed in an interesting opinion by Mr. Justice Ailshie. The Court there said: " . . . . This Court has uniformly adhered to the principle announced both in the Constitution and by the Statute that the first appropriator has the first right; and it would take more than a theory, and, in fact, clear and convincing evidence in any given case, showing that the prior appropriator would not be injured or affected by the diversion of a subsequent appropriator, before we would depart from a rule so just and equitable in its application

and so generally and uniformly applied by the Courts. Theories neither create nor produce water, and when the volume of a stream is diverted and seventy-five per cent of it never returns to the stream, it is pretty clear that not exceeding twenty-five per cent of it will ever reach the settler and appropriator down the stream and below the point of diversion by the prior user . . . . " ". . . . So soon as the prior appropriation and right of use is established, it is clear, as a proposition of law, that the claimant is entitled to have sufficient of the unappropriated waters flow down to his point of diversion to supply his right, and an injunction against interference therewith is proper protective relief to be granted. The subsequent appropriator who claims that such diversion will not injure the prior appropriator below him should be required to establish that fact by clear and convincing evidence . . . . . "

And again in the case of Joslyn v. Daly 15 Idaho 137, 96 Pac 568, the Court reaffirmed the rule announced in the case of Moe v. Harger by saying: ". . . . . In this connection, we think it well enough to call attention to the fact that if these springs are in the gulch or valley through which Seamans creek flows, and toward which their waters would naturally percolate and flow, then they must be in a sense and measure tributary to the stream; and the only further question that can arise is as to the amount of water that could reach the main stream from these springs or source of supply. It seems

self-evident that to divert water from a stream or its supplies or tributaries must in a large measure diminish the volume of water in the main stream, and where an appropriator seeks to divert water on the grounds that it does not diminish the volume in the main stream or prejudice a prior appropriator, he should, as we observed in Moe v. Harger, 10 Ida. 305, 77 Pac. 645, produce "clear and convincing evidence showing that the prior appropriator would not be injured or affected by the diversion." The burden is on him to show such facts. In this case there can be no reasonable doubt but that the appellant is entitled to have at least the volume of water flow from these springs into Seaman's Creek as great and to as full an extent as it was at the time the decree was entered in Daly v. Josslyn, provided these springs flow as much water at this time . . . ." Adhering then to the principle announced by the State Supreme Court and applying it to the evidence here we find that the stream arises far up in the mountains and during the highwater it flows in a continuous surface stream from its source to a short distance below Arco, a distance of about 75 miles. About 25 miles above Arco is a place called "The Narrows" where the stream flows and the valley there is about a quarter mile wide, from there the valley widens out into a basin about 8 miles wide, the basin of the valley is composed of gravel and earthen deposit and when flood waters come they fill up and saturate the gravel and earthen deposit which serves as a natural reservoir and when that is done it causes a water supply, which causes the water

to rise until the stream is furnished with additional water. In the ordinary irrigation of land in the valley and the transporting of water from the main channel of the stream as was done by the Commissioner and the Company at the points of diversion on the stream about thirty per cent of the water would be lost before return to the main channel of the stream above the point of diversion of the petitioner on the stream. It would take then, more than a theory under the evidence to show that the prior appropriator would not be injured or his amount of water not diminished by the manner of diverting the flow of the stream through canals above, on account of the sinks of the river, for we must not forget that the petitioner is to have sufficient of the unappropriated waters flow down to his point of diversion to supply his right and as has been said, when a subsequent appropriator who claims that diversion will not injure a prior appropriator below him, is required to establish that fact by clear and convincing evidence. This was not done as disclosed by the evidence in the present case and the petitioner is entitled to injunction against interference against the Utah Construction Company and its successors in interest, and their agents, servants, employees and attorneys, which will be an order made at this time containing the provisions that there is to be delivered at the 2-B gauging station 34 C F S as natural flow without deduction for water diverted into any ditch above the 2-B gauging station and all natural flow water be carried down the main channel of Big Lost River under conditions as they exist-

ed at the time the decree was entered, and that the petitioner Wilse A. Nielson is entitled to have delivered into the intake of the Miller ditch 6.4 C F S until it is filled to its full extent in accordance with the decree.

As to the remaining question of damages, which was left open until the question here was determined, that will be taken up and a hearing had at the next regular term of Court at Pocatello, with the understanding that the years involved as far as the Utah Construction Company is concerned will be confined to 1933 and 1934, for it appears from the evidence that the petitioner received his water up to and including 1932 and that in 1935 the Utah Construction Company, did not operate the system and project as the Irrigation District did so, under the option to purchase, its right and system, and in July 1936, made and delivered a conveyance thereof to the District, and therefore it would not be liable in damages for those two years.

(Title of Court and Cause)

ORDER

Filed July 9, 1937

The petitioner, Wilse A. Nielson, having filed herein a petition for an order to show cause, against the Utah Construction Company, why it had not permitted the

waters of Big Lost River to flow down the channel of the stream so as to protect the decreed rights of petitioner, and praying for damages sustained in the loss of crops by reason of the alleged wrongful diversion and use of water decreed to petitioner, and the Court having issued an Order to show cause, pursuant to said petition, and the plaintiff, Utah Construction Company, having filed its answer and amended answer, and the petitioner having filed a reply to said answer, and the matter having come on for hearing regularly before the Court on the said petition and answer and amended answer and reply thereto, and the Court having heard the evidence offered by the respective parties, and having heard the arguments of counsel thereon, and having considered the same, and being fully advised in the premises, it is ORDERED:

That the plaintiff, Utah Construction Company, its successors in interest, the Big Lost River Irrigation District, and all of the agents, servants, employees and attorneys for the plaintiff, Utah Construction Company, and its successors in interest, the Big Lost River Irrigation District, and any person administering the decree herein, are hereby enjoined and restrained from in any manner interferring with the natural flow waters of Big Lost River as determined by the terms of the decree heretofore entered herin, until the petitioner, Wilse A. Nielson, has had delivered into the intake of the Miller Ditch, 6.4 C.F.S. of the waters of Big Lost River, to fill his said right under said decree, and the said plaintiff, Utah Construction Company and the Big Lost River Irrigation

District, and all of their agents, servants, employees and attorneys and any Commissioner or other person administering the decree herein are required to deliver at the 2-B gauging station specified in said original decree 34 C.F.S. as natural flow water without deduction for water diverted into any ditch above the said 2-B gauging station, and to carry all of the said natural flow water of the Big Lost River down the main channel of Big Lost River under all conditions as they existed at the time the said original decree was entered herein, and without any diversion whatever from the main channel of the Big Lost River by means of by-pass or other diversion canals or ditches used, or intended to be in any manner used, for diverting water from the main channel of Big Lost River around any portion of said channel, or for any use whatever until there has been delivered into the intake of the said Miller Ditch for petitioner's use on his said land 6.4 C.F.S. of the waters of Big Lost River.

And it is further ordered that said injunction continue during the pendency of this proceeding, and that Findings of Fact, Conclusions of Law and Decree are to be considered and entered after the question of damages is heard and determined as provided for in the written opinion of the Court so filed.

Dated July 9, 1937.

CHARLES C. CAVANAH
District Judge.

(Title of Court and Cause)

MINUTES OF THE COURT OF NOVEMBER 1, 1937.

This matter came on for further hearing on question of damages on the petition of Wilse A. Nielsen; counsel for the respective parties being present.

Counsel for the Utah Construction Company moved the Court to vacate the Court's order on the petition heretofore made and to dismiss the said petition of Wilse A. Nielson. After hearing argument of counsel on the motion, the Court denied the same. Counsel for the Utah Construction Company asked and was granted exceptions to the order.

Roy W. Thompson was recalled and further examined as a witness and A. F. Quist, Roy McClure and William Rothwell were sworn and examined as witnesses on the part of the Utah Construction Company, respondent, and here both sides close.

The matter was taken under advisement by the Court. The petitioner was granted twenty days to file brief and the respondent the twenty days following.

(Title of Court and Cause)

OPINION
Filed January 11, 1938

Edwin Snow, Boise, Idaho,
A. E. Bowen, Salt Lake City, Utah,
Attorneys for the Plaintiff.

D. A. Skeen, Salt Lake City, Utah,
John A. Carver, Boise, Idaho,
Attorneys for the Petitioner Wilse A. Nielsen.

January 11, 1938

CAVANAH, District Judge.

A recital of the nature of the present controversy and the question in dispute as disclosed by the record were made in the opinion of the Court of July 7, 1937 where the conclusion was reached that the Utah Construction Company had diverted part of the natural flow of Big Lost River in violation of the provisions of the original decree entered in March 1923 wherein the petitioner was entitled by a prior right to the use of the waters of the stream and as then understood the question as to whether the Company was liable in damages to petitioner was left open to thereafter be determined in the event the evidence disclosed that its acts were of sufficient character to cause damage to the petitioner during the years 1933 and 1934. To clarify the opinion of the Court of July 7, 1937, attention is called to the views there expressed as to what questions were decided and how far the opinion went.

It will be observed that the principal question then presented and decided was as to whether the company had violated the original terms of the decree which deprived the petitioner of his prior decreed right and an interpretation of the decree when applied to the evidence was there given as it was said after reciting the provisions of the decree and the evidence bearing upon that question that: "It would take then, more than a theory under the evidence to show that the prior appropriator would not be injured or his amount of water not diminished by the manner of diverting the flow of the stream through canals above, on account of the sinks of the river, for we must not forget that the petitioner is to have sufficient of the unappropriated waters flow down to his point of diversion to supply his right and as has been said, when a subsequent appropriator who claims that diversion will not injure a prior appropriator below him, is required to establish that fact by clear and convincing evidence. This was not done as disclosed by the evidence in the present case and the petitioner is entitled to injunction against interference against the Utah Construction Company and its successors in interest, and their agents, servants, employees and attorneys, which will be an order made at this time containing the provisions that there is to be delivered at the 2-B gauging station 34 C F S as natural flow without deduction for water diverted into any ditch above the 2-B gauging station and all natural flow water be carried down the main channel of Big Lost River under conditions as they existed at the time the de-

cree was entered, and that the petitioner Wilse A. Nielson is entitled to have delivered into the intake of the Miller ditch 6.4 C.F.S. until it is filled to its full extent in accordance with the decree."

"As to the remaining question of damages, which was left open until the question here was determined, that will be taken up and a hearing had at the next regular term of Court at Pocatello, with the understanding that the years involved as far as the Utah Construction Company is concerned will be confined to 1933 and 1934, for it appears from the evidence that the petitioner received his water up to and including 1932 and that in 1935 the Utah Construction Company, did not operate the system and project as the Irrigation District did so, under the option to purchase, its right and system, and in July 1936, made and delivered a conveyance thereof to the District, and therefore it would not be liable in damages for those two years."

It will be noted that the Court said: "For we must not forget that the petitioner is to have sufficient of the unappropriated waters flow down to his point of diversion to supply his right and as has been said, when a subsequent appropriator who claims that diversion will not injure a prior appropriator below him, is required to establish that fact by clear and convincing evidence. This was not done as disclosed by the evidence in the present case and the petitioner is entitled to injunction against interference against the Utah Construction Company and its successors in interest, and their agents, servants, em-

ployees and attorneys, which will be an order made at this time containing the provisions that there is to be delivered at the 2-B gauging station 34 C.F.S. natural flow without deduction for water diverted into any ditch above the 2-B gauging station and all natural flow water be carried down the main channel of Big Lost River under conditions as they existed at the time the decree was entered, and that the petitioner Wilse A. Nielson is entitled to have delivered into the intake of the Miller ditch 6.4 C.F.S. until it is filled to its full extent in accordance with the decree." And it was there only concluded that a violation of the decree by the Company had happened during the years 1933 and 1934 and that the petitioner is to have sufficient of the unappropriated waters flow down to his point of diversion to supply his right and that was not done, and that he is entitled to an injunction against interference against the Company and its successors in interest and an order to be made at that time containing the provision "that there is to be delivered at the 2-B gauging station 34 C.F.S. as natural flow without deducting for water diverted into any ditch above the 2-B gauging station and all natural flow water be carried down the main channel of the stream under conditions as they existed at the time the decree was entered, and that the petitioner is entitled to have delivered into the intake of the Miller ditch 6.4 C.F.S. until it is filled to its full extent in accordance with the decree."

On February 23, 1937, an Order to show cause was entered and thereafter on July 9, 1937, the Company was

temporarily enjoined during the pendency of the proceedings from interfering with the petitioner's right. Thus it will be seen that the nature and scope of the petition is that the petitioner is seeking damages for an alleged violation of the original decree and also relief from a continuation thereof.

On the second hearing further evidence was received bearing on the question of damages and that the Company had transferred its interest to the Irrigation District and ceased to operate the system and project prior to the time of the filing of the present petition. The Company now asserts: (a) That the Court has no jurisdiction under the evidence to issue injunction against it or against the irrigation District who was not a party to the proceedings. (b) That the petitioner is not, under the evidence, entitled to a permanent injunction, as the evidence affirmatively discloses that it had before the petition was filed on February 8, 1937, parted with all its interest in the system and project and ceased to operate the same. (c) That no judgment for damages against it can be rendered in the present proceeding because there does not exist facts to entitle petitioner to injunctive relief and therefore the Court does not have jurisdiction to decide the issue of damages which is purely incidental to the right of injunctive relief, and (d) That there is no proof of the amount or extent of petitioner's injury or damages, even if it was damaged.

Disposing of these contentions after further consideration as thus stated, first (a and b) that the Court has

not jurisdiction under the evidence to issue an injunction against the Company and Irrigation District as the evidence affirmatively discloses that it had prior to the filing of the present petition, on February 8, 1937, parted with all of its interest in the system and project to the District and ceased to operate the same, and that the District is not a party to the present proceeding, it seems sufficient to say that the undisputed evidence shows that prior to the filing of the petition the Company had transferred all of its interest in the system and project to the Irrigation District and had ceased to operate the same and that the Irrigation District is not a party to the present proceeding which would not warrant, in the present proceedings, the issuance of a permanent injunction against them, or the necessity for the same, for under the original decree the Company and its officers, agents and successors are perpetually enjoined. This is conceded in petitioner's brief where it is said that "the injunction heretofore issued in the case against the Utah Construction Company, and its officers, agents, successors will continue in full force and effect and no further Order of injunction is now necessary". That being the situation, and the record so discloses, there appears no necessity for the issuance of an injunction in the present proceeding as the petitioner already has a permanent injunction against the acts complained of in the present proceeding by the original decree. So we pass to the second contention of the Company (c) that no judgment for damages against it should be rendered because there does not exist facts

entitling petitioner to injunctive relief and therefore jurisdiction does not exist in the Court to decide the issue of damages which is purely incidental to injunctive relief. Since the parties have now rested and the evidence now discloses that the Company had parted with all of its interests in the system and the project and had ceased operating the same prior to the institution of the present proceedings, the Court is required to consider and decide the contentions of the Company for the views expressed in its former opinion do not warrant the Court in not disposing of the contentions now presented.

An analysis of the petition seems to contain averments seeking both equitable and legal relief. In other words, the allegations relate to the violation and a continuation of a violation of the original decree in the wrongful diverting of waters of the stream which deprived petitioner of his decreed prior right to his damage in the sum of $12,500.00 for an Order of the Court directing delivery to him of the water decreed, and prays for an order that the Company show cause why it has not complied with the provisions of the decree, for damages and such orders as are proper and necessary to the proper administration of the decree and the distribution of water thereunder according to the terms of the decree.

We are then first confronted with the principal inquiry, before coming to the question of damages, are the averments of the petition and the proof governed by the principles existing before the adoption of general equity rules 22 and 23, which was that if a petition states a case

entitling the petitioner to equitable relief and the proof fails to establish the averments of the petition in that respect, the Court is without jurisdiction to proceed further and determine the rights that are properly in a Court of law? In other words, where equitable rights are averred they must be proved before legal rights should be determined by a Court of equity. 10 R C L 372; 21 C J 142; Mitchell v. Dowell 105 U S 430; Clarke v. Wooster 119 U S 324; American Falls Milling Co., v. Standard Brokerage & Distributing Co., 248 Fed 487.

Of course, where the Court has taken cognizance of the equitable action and the proof established the same, it will do complete justice between the parties even though it involves the granting of incidental legal rights, but that principle would not apply here, where it now appears that the Company was not doing anything or threatening to do anything as alleged in the petition because, as has been said, at the time the petition was filed, the Company had theretofore parted with its interest in the system and project and ceased operating it or having anything to do with it. The issues now presented have all arisen since the original case was first presented and the damages now claimed were not incidental to it, because they did not then exist.

The authorities relied upon by petitioner are situations where the right to equitable relief were averred and relied upon and existed at the time the bill was filed.

If the primary question here is one for damages as contended for by the petitioner and the issuance of an

injunction is incidental thereto, then the Company would be entitled to have the legal claim of damages submitted to a jury, which it has not yet waived. We must consider the petition as we find it, and it is there clearly averred that the petitioner requests injunctive relief from a continuation of violations of the original decree which he asserts caused the damage now claimed. No doubt seems to exist that prior to the adoption of general equity rules 22 and 23 the practice was "Where a cause of action cognizable at law is entertained in equity on the ground of some equity relief sought by the bill, which it turns out cannot, for defect of proof or other reason be granted, the Court is without jurisdiction to proceed further and should dismiss the bill and remit the cause to Court of law". Mitchell v. Dowell, Supra.

The conclusion then is reached that the Court cannot itself render a decree for damages under the averments of the petition and the proof as the cause is one essentially a law case and comes under Equity rule 22.

The next question arises, should the Court under the general equity practice now adopted transfer the petition and the law questions to the law side of the Court under general equity rules 22 and 23 which now govern the practice in a suit in equity? Equity rule 22 provides: "If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential," and equity rule 23

provides: "If in a suit in equity a matter ordinarily determinable at law arises, such matter shall be determined in that suit according to the principles applicable, without sending the case or question to the law side of the Court."

It is therefore apparent that these rules merely provide a change in procedure existing prior to their adoption. The essential distinction existing between equitable and legal remedies and rights are not in any degree changed or abolished by general equity rules 22 and 23. The two rules provide for different kind of causes of action. Under rule 22 if a case essentially is a law one improperly brought in equity, it must be transferred to the law side. While under rule 23 if the case looked at as a whole is an equitable one, and a question arises in it triable by jury, a jury trial is granted to settle the legal issues with out transfer. This interpretation of the rules is clearly made by the Fourth Circuit Court of Appeals in the case of Colleton Mercantile & Mfg. Co., et al v. Savanah River Lumber Co., 280 Fed. 358, 363, where it is said: "Under rule 22, if the case is essentially a law case improperly brought in equity, it must be transferred to the law side. Under rule 23, if the case, looked at as a whole, is an equity case, but a question arises in it triable by jury, a jury trial is held to settle the legal issue without transfer. When the legal issue has been settled by the verdict of the jury, the Court adjudicates the equitable issues in the light of the verdict."

The purpose of the changed procedure provided for by the rules is to not require a dismissal of the cause and

compel the parties seeking relief to start another proceeding, and in the interest of time and costs, to dispose of the controverted issues under the pleadings filed, with such changes as are proper to present the issues of law. Under these rules the Court does not loose jurisdiction of the cause because of failure of petitioner to pursue the proper remedy and the cause should not be dismissed upon the ground of adequate remedy at law, as the proceedings being one primarily at law to be transferred to the law side of the Court it becomes the duty of the Court under equity rule 22 to transfer the cause to the law side and to test the sufficiency of the petition by giving to the company the right to test the petition by demurrer or the sufficiency of the evidence, Brown v. Kossove et al., 255 Fed. 806, Wegeman v. Reeves et al. 245 Fed. 254. So the present proceeding being now transferred to the law side of the Court and the petition in its present condition not stating facts sufficient to give the Court jurisdiction for want of diversity of citizenship being alleged, the same will be dismissed unless the petitioner, by amendment made within 10 days alleging sufficient facts showing diversity of citizenship under equity rule 19, and if such is done, the law issue as to damages will be tried by a jury unless a jury trial is waived. Should the parties waive trial of the issue of damages before a jury and conclude to submit the case to the Court upon the evidence already taken upon that issue, provided the petition is amended to meet the requirement thus stated and do not desire to present further testimony on that issue then

the Court will dispose of the question of damages on the record already presented, but in the event the parties conclude, if the petition is amended to state facts sufficient to warrant petitioner to proceed on the law side of the Court, to present further testimony on that issue before a jury, then a jury trial must be had.

Accordingly an Order will be made denying the injunctive relief prayed for in the petition and the temporary injunctions heretofore issued dissolved and the petition for the determination of damages during the years 1933 and 1934 be transferred to the law side of the Court.

(Title of Court and Cause)

AMENDED PETITION IN EQUITY

Filed Jan. 21, 1938.

By leave of Court granted, the petitioner herein, Wilse A. Nielson, files this, his amended petition, herein and respectfully shows to the Court:

1. That the above entitled action was filed in the above entitled Court by the Utah Construction Company, a corporation and citizen of the State of Utah as plaintiff, on or about the.....day of.....19.....; that at the time of the filing of the said complaint, the Utah Construction Company was a corporation duly organized and existing under the laws of the State of Utah.

2. That the defendants therein named were each and all citizens of the State of Idaho; that the said action was filed for the purpose of quieting title to waters and water rights and to adjudicate water rights, all being within the State of Idaho. That the defendants therein named were either served with process or voluntarily appeared in said action so that the Court acquired complete jurisdiction of the parties and the subject matter of said action; and that such proceedings were had therein that either on a basis of stipulation or evidence adduced, the Court did on or about the 15th day of March, 1923, make and enter its decree ordering, adjudicating and determining the rights of all of the parties to said proceeding and with respect to the subject matter of the said action, and by the terms of said decree, among other things, the Court decreed:

> "All rights herein decreed to the plaintiff and the several defendants are decreed for the beneficial and specified, and none of the parties hereto, or their successors in interest, whether heirs, executors, administrators, successors or assigns, shall have the right to divert any of the waters of Big Lost River, or any of its tributaries, except for beneficial use, and whenever such use has ceased such party or parties shall cease to divert, and shall have no right to divert, the said waters, or any part thereof, and each and every of the parties hereto, their servants, attorneys, employees and successors in interest, as aforesaid, are hereby enjoined and restrained from any and all interference with or diversion or use of the

said waters, except in the manner and to the extent, and for the purposes provided in this decree, whenever such interference, diversion or use would in any manner interfere with the diversion or use of the water awarded by this decree to any of the other parties to this action.

"4. The Court hereby expressly reserves jurisdiction to supervise and enforce the administration of this decree hereafter and from time to time as occasion may require.

"In the first instance the administration of this decree shall be left with Lynn Crandall, who is hereby appointed Commissioner for that purpose, and any successor who may be hereafter appointed by this Court. * * *

2. That at the time of the filing of the said action and the entry of the said decree therein, one Lewis T. Miller was the owner of the following described property, to-wit:

"The Northeast quarter of Section 12, Township 3 North, Range 26 East Boise Meridian, and the East half of the Northwest quarter and Lots 1 and 2 of Section 7, Township 3 North, Range 27 E. B. M."

located in Butte County, State of Idaho, and the said Lewis T. Miller was named as a defendant in said action, and there was in said action decreed to the said land so

described as owned by the said Lewis T. Miller and for the use on said land as appurtenant thereto of the waters of Big Lost River in Butte County, Idaho, 6.4 second feet of water with a priority as of June 1, 1890, the said water to be diverted from Big Lost River through the Miller Ditch, having its point of diversion in the Southwest quarter, of Section 1, Township 3 North, Range 26 E. B. M., for the irrigation of the following described land, to-wit:

> The Northeast Quarter of Section 12, Township, 3 North, Range 26 E. B. M., and the East half of the Northwest quarter, and Lots 1 and 2 Section 7, Township 3 North, Range 27 E. B. M.

3. That by the terms of the said decree it was further provided that all rights granted to the plaintiff were "subject to such prior rights as are herein decreed in the order of their respective priorities. * * * Said plaintiff, Utah Construction Company, has a right to divert at its point of diversion hereinafter stated, and to impound at its reservoir (known as the Mackay Reservoir) or in part to divert and part to impound at said reservoir all the waters of Big Lost River and its tributaries to the extent of 2300 cubic feet per second of time according to the dates of priority hereafter set forth, the water stored in said reservoir to be thereafter released from said reservoir at plaintiff's pleasure through the gates of the Mackay Reservoir Dam and thence down the natural channel of Big Lost River for use at the following points of diversion. * * *." And further, "in its exercise

of the rights herein defined, the plaintiff may, to the extent of its various appropriations, as hereinafter decreed, impound in storage and divert the waters of Big Lost River at all times, and at all seasons of the year when by so doing it does not interfere with the exercise of any prior rights fixed by this decree, and the water released by it from storage may be conveyed through the natural channel of the river, and shall be protected under the provisions of this decree for the distribution designated by plaintiff as though kept and conveyed within an artificial channel."

4. That pursuant to the terms of said decree, the waters of Big Lost River were stored in part and used by the said Utah Construction Company and for a time the water decreed to the land above described as now owned by petitioner, was supplied thereto through the natural channel of the Big Lost River and delivered at the diversion gate of the Miller Ditch onto the said Miller land as specified by said decree.

5. That after the said decree was entered and after the water had been apportioned to the said lands in accordance with the said decree and in or about the year 1929, the petitioner herein, Wilse A. Nielson became a resident and citizen of the State of Idaho residing on said land in Butte County, Idaho, and cultivating the said land as a means of livelihood. That the petitioner acquired the said land in reliance upon the terms and the provisions of the said decree and the water rights adjudicated and determined therein and decreed to the said

land for its use and benefit and appurtenant thereto, and continued to use, occupy, cultivate and farm the said land until, by reason of the acts and things hereinafter complained of as done by the plaintiff, Utah Construction Company, its officers and agents, in conjunction with other persons including the Big Lost River Irrigation District, a corporation of the State of Idaho, the crops and vegetation on said land were dried up and destroyed so that the petitioner was compelled to seek employment and residence elsewhere.

6. That in the course of the administration of the said decree controversies arose between other land holders and owners of water rights affected by said decree, and the Utah Construction Company, and during the year 1929 the Utah Construction Company through the said water commissioner, and in violation of the terms of said decree, caused large quantities of water previously owned and decreed to the land of the petitioner herein and other persons owning land and water along the channel of said Big Lost River, near and below Arco, Idaho, to be stored and wrongfully diverted to the land of the plaitiff and other lands controlled by the plaintiff, Utah Construction Company. That by reason of the said wrongful storing and diversion of said water, in disregard of the rights of the petitioner herein, the water which had been decreed to petitioner and others similarly situated was taken away by plaintiff and the water level in and around the petitioner's said land was lowered, the petitioner's decreed source of water supply to his said land was destroy-

ed and the trees, shrubs and crops growing and planted on said land were destroyed as hereinafter set out and the petitioner sustained great damage.

7. That the said wrongful use, diversion and storage of water by the plaintiff, Utah Construction Company, and for its benefit, continued and the crops planted by petitioner were destroyed during the year 1933 and 1934. That during the year 1935, the said plaintiff, Utah Construction Company, entered into some agreement with the Big Lost River Irrigation District, a corporation of the State of Idaho, by which the Big Lost River Irrigation District, participated in the use, diversion and storage of the said water of Big Lost River and the benefit therefrom, and thereafter, during the years 1935, 1936 and 1937, the said Big Lost River Irrigation District, a corporation of the State of Idaho, asserted certain interests in the waters decreed to the plaintiff, Utah Construction Company, by the terms of said decree, and assumed to, and did, work and operate in conjunction with the water commissioner designated by the Court under the terms of said decree, and the continuing jurisdiction of this Court thereunder, and the said Big Lost River Irrigation District, as such successor in interest of the plaintiff, Utah Construction Company, working with said water commissioner, appointed under orders of this Court, has caused the entire flow of the waters of Big Lost River to be diverted from the channel of the said Lost River into ditches and by-pass canals, all from and away from petitioner's said land, and have taken and

withheld the said waters from entering or flowing down the said channels of the said Big Lost River so that the river bed of the said Big Lost River, which was the channel designated in said decree as the source of petitioner's water supply and point of diversion from said Big Lost River, near the petitioner's property became wholly dried up, the vegetation on and along said river and on petitioner's property was dried up and died, and was destroyed, and the crops and vegetation growing on petitioner's said ground was destroyed and petitioner has suffered great damage by reason thereof.

8. That the said Big Lost River Irrigation District Company, acting under authority and as successor to the plaintiff, Utah Construction Company, threatens to continue to violate the terms of the said decree as herein set out, and to wrongfully divert the waters from the main channel of said Big Lost River and withhold the same from petitioner.

9. That petitioner has made repeated appeals to the said officers and directors of the said Big Lost River Irrigation District and to the Commissioner, and those in charge of distributing the said water, to deliver water to his said land in accordance with the terms of said decree, for the purpose of saving said crops from loss and destruction. That the said Big Lost River Irrigation District, and its officers and agents have wholly ignored the petitioner's rights and have continued to wrongfully divert the water, in violation of the terms of said decree, into canals and by-passes, and to withhold the said water

from petitioner, and will continue to do so and continue to store and withhold the water from the natural channel of the Big Lost River unless enjoined and restrained from so doing by order of this Court. That the petitioner was unable to procure water in the manner specified by said decree during the years 1933, 1934, 1935, 1936 and 1937, and the said crops growing thereon were wholly destroyed and lost to petitioner.

10. That during the said years the petitioner has had the said land under cultivation, and has had crops planted thereon, and by reason of the acts of the said Utah Construction Company, and its successors in interest, in violation of the terms of said decree, he was unable to procure the water in the manner specified by said decree, and the crops growing thereon were destroyed and lost to this petitioner, notwithstanding that there has been at all times ample water flowing in the Big Lost River system if permitted to flow in its usual and natural course, as conditions existed at the time the decree herein was entered and under which the water duties and necessities were determined at the time of the entry of said decree, to fully comply with the terms of said decree, as affecting the petitioner's said land and to fully irrigate and mature the crops growing thereon and to protect the trees and vegetation, and to protect the petitioner from the loss of the said crops and trees. That by reason of the wrongful acts herein set out and committed, the petitioner has been damaged in an amount in excess of $10,000.00. That by reason of the acts of the plaintiff, Utah Construction

Company, and the threatened acts of the Big Lost River Irrigation District as herein set out, it is necessary that the Court exercise its retained and inherent jurisdiction as set out in said decree at all times to enforce proper construction of the said decree, and to further explain, enforce and correct the said decree and the administration thereof wherever it is necessary to fully protect and enforce the rights of the petitioner herein and only by further proper order of this Court can the said decree be fully enforced and the petitioner herein given the rights decreed to him and said land by said decree under the conditions existing and unless the Court makes such further order the petitioners rights will be nullified and his property will be destroyed and he will be wholly deprived of the enjoyment of the rights so decreed to him and, by the proper enforcement of the said decree under the conditions existing at the time the said decree was entered, there is ample water to irrigate the petitioner's said land and to raise and mature the crops thereon.

WHEREFORE, the petitioner prays:

1. That upon the reading of this verified petition the Court make and enter an order, making the Big Lost River Irrigation District, a corporation, a party to this proceeding and subject to all decrees and orders made herein.

2. That the Court make and enter an order construing the said decree and enforcing the same in accordance with its terms and correcting any and all errors in the future interpretation and enforcement of the said decree,

and a further order punishing any and all parties guilty of violation of the said decree as for contempt and directing the strict compliance with the said decree in all of its terms and provisions as affecting the rights of the petitioners herein, and particularly directing that the waters of Big Lost River, or sufficient thereof, be permitted to flow in the natural channel of said Big Lost River so as to reach the Miller Ditch intake, on said river as specified in said decree, and to flow to and upon petitioner's land strictly in accordance with the terms of said decree.

3. That the said Big Lost River Irrigation District be required to answer this petition as a party hereto, and that it be permanently enjoined and restrained from storing any water and from taking, diverting or using any of the waters of Big Lost River contrary to or in violation of any of the terms of or provisions of the said decree.

4. Petitioner prays for an order fixing a time and place of hearing for the determination of the claims of the petitioner herein for damages sustained in the loss of crops by reason of the violation of said decree and the wrongful diversion and use of the water decreed to petitioner herein, which waters were owned by petitioner and of which petitioner was deprived since the entry of the said decree, and that upon such determination being made, that the petitioner herein be given judgment accordingly.

5. Petitioner further prays that any other landowner to whom water was decreed for particular land, or his suc-

cessor in interest, may be permitted to come in and join in this petition, upon his offering to pay, or paying, his proportionate share of the expenses of the filing and of a hearing on this petition, and that on final hearing herein, the Court make and enter such orders as are proper and necessary to the further administration of the said decree and the distribution of the waters thereunder, according to the terms of said decree.

6. Petitioner prays for such other and further orders and relief herein as in the premises may be proper, including his costs incurred herein.

D. A. SKEEN
Attorney for Petitioner.

(Duly verified)

(Service Acknowledged—January 21, 1938.)

(Title of Court and Cause)

MOTION TO DISMISS AMENDED PETITION OF WILSE A. NIELSON AND TO STRIKE SAME

(Filed January 31, 1938.)

I.

COMES NOW The Utah Construction Company and moves to dismiss the amended petition of Wilse A. Nielson filed herein on the 21st day of January, 1938 on the following grounds, to-wit:

(1) That the said amended petition does not conform

to the leave granted by the court to petitioner in the court's memorandum opinion granting leave to amend.

(2) That it affirmatively appears from said amended petition that there is not the requisite diversity of citizenship between petitioner and The Utah Construction Company to give the court jurisdiction to determine the matter of damages, which is the only issue remaining undetermined by the court.

(3) That without leave of the court, and contrary to the court's memorandum decision given and rendered on or about January 11, 1938, petitioner has filed an amended petition in equity seeking to bring in Big Lost River Irrigation District as an additional party defendant, after the court's direction that the cause be transferred to the law side of the court.

(4) Said amended petition does not state facts sufficient to constitute a valid cause of action in equity against The Utah Construction Company.

(5) That said amended petition was filed contrary to Equity Rule 28.

(6) That it appears from the face of the amended petition that there is more than one defendant and different and distinct liabilities are asserted against each of the defendants.

II.

It is also moved that said amended petition, and the whole thereof, be stricken from the files on the grounds

set forth in subdivisions (1) to (3), inclusive, of the above motion to dismiss.

A. E. BOWEN,
Residence: Salt Lake City, Utah.

Dated January 29, 1938.

EDWIN SNOW,
Residence: Boise, Idaho,
Attorneys for Utah Construction Company.

(Title of Court and Cause)

ORDER

Filed March 10, 1938.

In harmony with memorandum opinion filed January 11, 1938, it is ORDERED that the injunctive relief prayed for in the petition be denied and the temporary injunction heretofore issued is disolved and that the petition for the determination of damages during the years 1933 and 1934 is transferred to the law side of the Court to hereafter be disposed of.

Dated March 10, 1938

CHARLES C. CAVANAH,
District Judge.

(Title of Court and Cause)

OPINION

Filed May 3, 1938

Edwin Snow, Boise, Idaho,
A. E. Bowen, Salt Lake City, Utah,
Attorneys for the Plaintiff.
D. A. Skeen, Salt Lake City, Utah,
Attorney for the defendant, Wilse A. Nielson.

May 3, 1938

CAVANAH, District Judge.

The status of the present case is that after the Court had concluded that the original petition contained primary legal relief for damages after the denial of the injunctive relief, it remains to now determine whether the amended petition has met the requirement of the Court and the rules applicable after the case was transferred to the law side of the Court to there be dealt with according to legal principles.

It will be observed by the opinion of the Court of January 11, 1938, plaintiff was granted permission to amend his petition alleging sufficient facts showing a diversity of citizenship and to comply with the rules relating to the transfer of actions from the equity side of the Court to the law side of the Court and if done then the law issue as to damages was to be tried by a jury, unless a jury was waived. So the only remaining question now before

the Court on the motion of the defendant Utah Construction Company to dismiss and strike is, does the amended petition comply with the order and rules of the Court? While plaintiff in his amended petition continues to assert that the action is an equitable one and should still be heard as such, as the petition is one wholly ancillary and incidental to the original proceedings initiated by the Utah Construction Company in this court, it seems necessary for the Court to state again that such a position cannot be sustained after considering the allegation of the original and amended petitions and the evidence, and the case will now have to be finally disposed of in accordance with the rules of, and the conclusion reached by the Court in the opinion of January 11, 1938, and when so transferred to the law side of the Court is should be proceeded with such alterations in the pleadings as shall be essential.

So we will then proceed to analyze the amended petition to ascertain if it recites facts sufficient to constitute a cause of action for damages, and not one in equity.

It is apparent after the case has been transferred to the law side of the Court and leave granted to amend the original petition to present the action for damages, the amended petition continues to be one for equitable relief containing matters not to be determined by a jury. It is insisted by the allegations of the amended petition that the equitable matters alleged in the original petition be continued for determination and attempt there is made to bring into the case another party, being the Big Lost

River Irrigation District, merely upon reading of the amended petition without permission being granted, who, the evidence shows was not responsible in any way for any damages to the plaintiff.

The prayer as well as the allegations alleged in the amended petition discloses the situation thus stated and the petitioner here declining to amend his petition to conform to the rules and order of the Court it becomes necessary for the Court to sustain the motion to dismiss and strike of the Utah Construction Company. An order will be entered accordingly dismissing the petition with the Utah Construction Company's costs.

(Title of Court and Cause)

ORDER

Filed May 3, 1938.

In harmony with memorandum opinion filed on this date, the motion to dismiss and strike of the Utah Construction Company is sustained and the amended petition of the Petitioner Wilse A. Nielson is dismissed with costs awarded to the Utah Construction Company.

Dated May 3, 1938.

CHARLES C. CAVANAH,
District Judge.

(Title of Court and Cause)

MEMORANDUM OF COSTS AND DISBURSEMENTS

Filed May 10, 1938.

Per diem, G. C. Vaughn, Court Reporter, 5½ days at $10.00 per day, $55.00; portion paid by Utah Construction Company		$ 35.00
		Disallow $15.00
Witness Fees:		
LYNN CRANDALL; Residence, Idaho Falls, Idaho, attendance on Court 7 days (3 hearings) at $1.50 per day	$ 10.50	
7 days' subsistence as above enumerated, $3.00 per day	21.00	
Mileage traveled from Idaho Falls, Idaho, to Pocatello, Idaho, and return, 100 miles each trip, (3 hearings); total 300 miles at 5c per mile	15.00	46.50
ROY W. THOMPSON: Residence Roseworth, Idaho, attendance on Court 7 days (3 hearings) at $1.50 per day	10.50	
Time necessarily occupied in		

going to and returning from Court at Pocatello, Idaho, from Roseworth, Idaho, 3 days (3 hearings) at $1.50 per day	4.50	
10 days' subsistence as above enumerated at $3.00 per day	30.00	
Mileage traveled from Roseworth, Idaho, to Pocatello, Idaho, and return, 248 miles each trip (3 hearings); taxable mileage 600 miles at 5c per mile	30.00	75.00
ROY C. PEARSON, Residence Mackay, Idaho, attendance on Court 2 days, (2nd hearing) at $1.50 per day	3.00	
2 days' subsistence as above enumerated, at $3.00 per day	6.00	
Mileage traveled from Mackay, Idaho to Pocatello, Idaho and return, 220 miles at 5c per mile	11.00	20.00
A. L. Quist, Residence, Arco, Idaho, attendance on Court 6 days, (3 hearings) at $1.50 per day	9.00	
6 days' subsistence as above enumerated, at $3.00 per day	18.00	
Mileage traveled from Arco,		

Idaho to Pocatello, Idaho and return, 168 miles each trip (3 hearings), total 504 miles at 5c per mile	25.20	52.20
R. W. ROTHWELL, Residence Leslie, Idaho, attendance on Court 2 days (3rd hearing) at $1.50 per day	3.00	
2 days' subsistence as above enumerated, at $3.00 per day	6.00	
Mileage traveled from Leslie, Idaho to Pocatello, Idaho and return, 204 miles, taxable mileage 200 miles at 5c per mile	10.00	19.00
ROY McCLURE, Residence Moore, Idaho, attendance on Court 2 days, (3rd hearing) at $1.50 per day	3.00	
2 days' subsistence as above enumerated, at $3.00 per day	6.00	
Mileage traveled from Moore, Idaho, to Pocatello, Idaho and return, 184 miles at 5c per mile	9.20	18.20
ROY WOODBRIDGE, Residence Arco, Idaho, attendance on Court 2 days (3rd hearing) at $1.50 per day	3.00	
2 days' subsistence as above enumerated, at $3.00 per day	6.00	

Mileage traveled from Arco, Idaho to Pocatello, Idaho, and return, 168 miles at 5c per mile	8.40	17.40
HOMER QUIST, Residence Arco, Idaho, attendance on Court 2 days, (1st hearing), at $1.50 per day	3.00	
2 days' subsistence as above enumerated, at $3.00 per day	6.00	
Mileage traveled from Arco, Idaho to Pocatello, Idaho, and return, 168 miles at 5c per mile	8.40	17.40
WINGER FARRELL, Residence, Arco, Idaho, attendance on Court 2 days, (1st hearing), at $1.50 per day	3.00	
2 days' subsistence as above enumerated, at $3.00 per day	6.00	
Mileage traveled from Arco, Idaho, to Pocatello, Idaho, and return, 168 miles at 5c per mile	8.40	17.40
E. H. HARRIS, Residence Mackay, Idaho, attendance on Court 1 day, (1st hearing), at $1.50 per day	1.50	
1 days' subsistence as above		

enumerated, at $3.00 per day	3.00	
Mileage traveled from Mackay, Idaho to Pocatello, Idaho, and return 220 miles at 5c per mile	11.00	15.50
HARRY PEARSON, Residence Leslie, Idaho, attendance on Court 1 day, (1st hearing), at $1.50 per day	1.50	
1 days' subsistence as above enumerated, at $3.00 per day	3.00	
Mileage traveled from Leslie, Idaho to Pocatello, Idaho and return, 204 miles, taxable mileage 200 miles at 5c per mile	10.00	14.50
BYRON SHERMAN, Residence American Falls, attendance on Court 1 day, (1st hearing), at $1.50 per day	1.50	
1 days' subsistence as above enumerated, at $3.00 per day	3.00	
Mileage traveled from American Falls, to Pocatello, Idaho, 27 miles at 5c per mile	1.35	5.85
J. RAY WEBER, Residence Mackay, Idaho, attendance on Court 2 days, (1st hearing), at $1.50 per day	3.00	
2 days' subsistence as above enumerated, at $3.00 per day	6.00	

Mileage traveled from Mackay, Idaho to Pocatello, and return 220 miles at 5c per mile	11.00	20.00
TOTAL		$373.95

The witnesses, Homer Quist, Winger Farrell, E. H. Harris, Harry Pearson and Byron Sherman, were Watermasters who had served on various sections of the Big Lost River during periods involved within the dates set up in the Petitioner's Petition herein. On the demand of the Utah Construction Company, they appeared at the First Hearing with their Watermaster's Records, showing distribution of water to persons entitled under the Big Lost River Decree to receive water during the periods when they were, respectively, Watermasters. To avoid the necessity for bringing them back to testify at the Second Hearing, stipulations were entered into between the Petitioner and the Utah Construction Company by which their various Records were identified and agreed to be admissible in evidence without the presence of the Witnesses in Court.

Taxed at $358.95

June 28, 1938.

W. D. McReynolds,

Clerk.

(Duly verified)

(Title of Court and Cause)

MOTION TO STRIKE

Filed May 24, 1938

Comes now the petitioner herein, Wilse A. Nielson, and hereby moves the Court to strike from the files herein the Memorandum of Costs and Disbursements filed herein by the Utah Construction Company, and the whole thereof, on the ground and for the reason that the said claimed costs and disbursements are not properly claimed, and by the terms of the memorandum of decision filed herein the Court definitely found and determined that the petition of Wilse A. Nielson, filed herein, was properly filed, and that the allegations therein with respect to the violation by the Utah Construction Company of the said decree were sustained, and that the Utah Construction Company wilfully and deliberately violated the terms of the said decree, and that the said petition was properly filed for the purpose of determining that the decree had been so violated, and the Court having so determined, the petitioner, as a matter of law, was entitled to his costs in connection therewith, and the Utah Construction Company having been found guilty of violating the terms of the said decree, could not claim costs against the petitioner on said petition.

Petitioner moves to strike from said Memorandum of Costs and Disbursements all of the items set out therein,

except the items for Homer Quist, Winger Farrell, Roy Woodbridge, Roy McClure, R. W. Rothwell and A. L. Quist, the said last named persons and the items being incident to the hearing before the Court on the question as to the amount of damages to which the petitioner was entitled.

This motion will be based upon the files and records in said action and on the opinions rendered by the Court and filed herein, and upon affidavits to be hereafter presented, and such other proof as may be presented at the hearing on this motion.

D. A. SKEEN,
Attorney for Petitioner,
Wilse A. Nielson.

(Service acknowledged May 24, 1938)

(Title of Court and Cause)

MOTION.

Filed June 25, 1938.

Comes now the petitioner herein, Wilse A. Nielson, and hereby moves the Court as follows:

1. To make specific findings of fact with respect to the violation of the decree herein by the Utah Construction Company and as pointed out and determined by this Court in its opinion filed herein on the 7th day of July, 1937.

2. To amend the judgment herein made and entered

on the 3rd day of May, 1938, so that the said judgment will set out and specify the grounds on which the said judgment is based, and particularly to show that the memorandum of opinion filed herein on the 3rd day of May, 1938, stated as the only ground and reason for the dismissal of the said petition was that the Court was wholly without jurisdiction to hear and determine the matters set forth and relied upon by petitioner in his amended petition.

3. To eliminate from said judgment the portion thereof awarding costs to the Utah Construction Company, the said judgment being erroneous in this particular in that the Court, being without jurisdiction to hear and determine the said matter, is without jurisdiction to award costs against the petitioner.

This motion will be based upon the files and records, minutes and opinions of the Court entered and filed herein.

D. A. SKEEN,
Attorney for Petitioner.

(Service acknowledged June 24, 1938)

(Title of Court and Cause)

MOTION

Filed June 25, 1938.

Comes now the petitioner herein, Wilse A. Nielson, and hereby moves the Court to strike from the files and

records herein the Memorandum of Costs and Disbursements heretofore filed herein by the plaintiff, Utah Construction Company, on the grounds and for the reasons:

1. That the said Court, under the record, orders and judgment entered herein, is wholly without jurisdiction to assess and tax costs herein.

2. That the Court and the Clerk herein, under the court rules, have no jurisdiction to tax costs under the decree and order of dismissal entered herein.

3. That the opinions and orders of the Court herein affirmatively sustain the contention of the petitioner, and the court has determined herein that plaintiff, who is seeking costs, acted in violation of the decree of this court, and therefore in contempt of this court, and is not therefore entitled to costs in any sum or amount whatever.

This motion will be based upon the files and records, minutes and opinions of the Court entered and filed herein.

D. A. SKEEN,
Attorney for Petitioner.

(Service acknowledged June 24, 1938)

(Title of Court and Cause)

CLERK'S MEMORANDUM ON TAXING OF COSTS.

Filed June 28, 1938.

This matter came on for taxation of plaintiff's costs upon the cost bill filed and objections thereto filed on the part of the Petitioner Wilse A. Nielson, both parties being represented by their counsel.

Objection No. 1 was overruled as the allowance of costs in the order of the Court is without qualification.

On Objection No. 2 $15.00 of the item charged for reporter's fees was voluntarily stricken by the plaintiff's counsel, it having been determined that the petitioner did not participate in employment of the reporter in the last 1½ days of the hearing, otherwise the balance of $20.00 for reporter's fees was allowed.

Objection No. 3 was disallowed as to both the witness fees and per diem for subsistence, and the plaintiff's costs are taxed against the petitioner in the sum of $358.95.

The petitioner asked and was granted exceptions.

Dated at Boise, this 28th day of June, 1938.

W. D. McREYNOLDS,
Clerk.

(Title of Court and Cause)

NOTICE OF APPEAL FROM ORDER OF CLERK TAXING COSTS HEREIN

Filed June 28, 1938.

Comes now Wilse A. Nielson, petitioner herein, and hereby appeals to the above entitled court from the determination and order made herein by the Clerk of the Court under the rules of this court denying and overruling the objections of petitioner to the cost bill filed and entered taxing the costs herein.

This appeal is taken on the files, records and objections heretofore filed herein.

Dated this 28th day of June, A. D. 1938.

D. A. SKEEN,
Attorney for petitioner.

(Title of Court and Cause)

OBJECTIONS TO COSTS

Filed June 28, 1938.

BEFORE HONORABLE W. D. McREYNOLDS, CLERK OF THE UNITED STATES COURT FOR THE DISTRICT OF IDAHO

Comes now the petitioner herein, Wilse A. Nielson,

and hereby files the following objections hereto to the costs claimed in the above entitled matter:

I.

Objects to the taxation or allowance of each and every item therein set out, or any costs whatever, to the petitioner herein, on the ground that the court and this clerk are without jurisdiction to tax the costs herein, having entered an order of dismissal of the said petition of the petitioner on the ground and for the reason that the court was without jurisdiction to hear and determine the cause.

II.

Objects to the allowance of $35.00 as a per diem to G. C. Vaughn, reporter, for five and one-half days for the reason that only one and one-half days were consumed in the taking of testimony affecting the plaintiff's claim for damages herein, the other four days spent by the reporter in said cause having been spent as court reporter in the proceedings herein on issues which were found by the court in favor of the petitioner, that is, the violation of the decree by the plaintiff, Utah Construction Company, as affecting the right of this petitioner, and the court having found such issues in favor of the petitioner, the petitioner, and not the plaintiff (defendant in that proceeding) is entitled to have his costs taxed.

III.

Objects to the following items listed under witness fees:

LYNN CRANDALL, attendance, subsis-

tence and mileage $46.50

ROY W. THOMPSON, attendance, witness fees and mileage and subsistence charge 75.00

ROY C. PEARSON, attendance, witness fees, mileage and subsistence charge..... 20.00

A. L. QUIST, attendance, witness fees, mileage and subsistence charge..... 52.50

HOMER QUIST, attendance, witness fees, mileage and subsistence charge 17.40

WINGER FARRELL, attendance, witness fees, mileage and subsistence charge 17.40

E. H. HARRIS, attendance, witness fees, mileage and subsistence charge..... 15.50

HARRY PEARSON, attendance, witness fees, mileage and subsistence charge 14.50

BYRON SHERMAN, attendance, witness fees, mileage and subsistence charge 5.85

J. RAY WEBER, attendance, witness fees, mileage and subsistence charge 20.00

on the ground and for the reason (1) that each of the said witnesses was called and testified in the proceedings on which the issue involved was as to whether the Utah Construction Company had violated the terms of the decree, and the witness Thompson was an officer and commissioner of the court at the time of such hearing and as such is not entitled to witness fees, and the issue in said hearings at which said witness testified were determined

in favor of the petitioner to the effect that the decree had been violated by the Utah Construction Company, and, therefore, the petitioner was the prevailing party and was entitled to his costs and the Utah Construction Company, as defendant, was not entitled to its costs, and (2) on the further grounds that the items of subsistence charges therein set out were not collectible as items of cost and were not certified in any order of court for payment.

This petitioner objects further specifically to the allowance of any subsistence charge to any of the witnesses above named or/and to the following witnesses as listed in said memorandum:

R. W. ROTHWELL in the amount of.....$6.00
ROY McCLURE in the amount of.....$6.00
ROY WOODBRIDGE in the amount of.....$6.00

D. A. SKEEN,
Atty. for Petitioner.

(Duly verified)

(Service Acknowledged—June 28, 1938)

(Title of Court and Cause)

Minutes of the Court of June 28, 1938.

The matter of petition of Wilse A. Nielson against the plaintiff, came on for hearing on the motion of the petitioner to amend the judgment or order awarding the

plaintiff costs, and on motion to strike the plaintiff's memorandum of costs.

D. A. Skeen, Esquire, appeared as counsel for the petitioner and Edwin Snow, Esquire, appeared for the plaintiff.

After hearing counsel on the motions, it was ordered that the motion to amend and the motion to strike be and the same hereby are denied. The petitioner asked and was granted exceptions to the order.

At a later time, counsel for the respective parties appeared for hearing before the Court on the petitioner's appeal from the action of the Clerk in taxing the plaintiff's costs.

The Cost bill, the petitioner's objections and the clerk's order in taxing the costs were presented to the Court. After hearing argument of the respective counsel, the Court took the matter under advisement.

(Title of Court and Cause)

OPINION

Filed July 13, 1938.

A. E. Bowen, Salt Lake City, Utah,
Edwin Snow, Boise, Idaho,
Attorneys for the Plaintiff,

D. A. Skeen, Salt Lake City, Utah,
Attorney for petitioner, W. A. Nielson,
July 13, 1938

CAVANAH, District Judge.

The petitioner Nielsen appeals from the Order of the Clerk taxing plaintiff's costs and overruling his objections to the cost bill filed. The first objection that the Court has not jurisdiction to tax costs after dismissing petition is untenable as the petition was finally dismissed after two hearings on the merits, and that the petitioner was successful in the first hearing and the plaintiff on the second hearing.

The item covered by the second objection was voluntarily stricken by the plaintiff.

The third objection was disallowed by the Clerk and the plaintiff's costs were taxed against the petitioner for $358.95.

This objection presents the question as to whether witness fees and mileage should be taxed against petitioner where it appears that the witnesses were called and testified in a proceeding on which the issue involved was as to whether plaintiff had violated the terms of the decree and the issue there determined in favor of the petitioner and that the items of subsistence charges were not collectible as they were not certified by an order of the Court before payment.

To determine this objection it becomes necessary to ascertain the nature of the proceeding and the final outcome. The original petition, after evidence was taken, was found by the Court to be one by which the petitioner prayed for relief primarily for damages and based up-

on allegations of a violation of the decree and that being the case the Court transferred the case to the law side of the Court to there be tried and determined after proper allegations and amendments to the petition to be made within a certain time. The petitioner then filed an amended petition in which he declined to so amend it as the amended petition still asserted equitable relief and not proper allegations to constitute a cause of action at law, therefore, on motion of the plaintiff for failure to comply with the order of the Court the amended petition was dismissed with costs.

So the question for decision is whether all of the costs in both proceedings should be taxed against the petitioner or a proportion thereof be made.

The record shows there were two hearings. The first, after taking of testimony, the Court heard the parties as to whether there was a violation of the terms of the decree and after determining that fact upon the evidence then presented, it was concluded that the terms of the decree was violated by the plaintiff. The second hearing was upon the question of damages and after the hearing the conclusion was reached that the relief prayed for was for legal relief and the Court then ordered the case, under the general equity rules, be transferred to the law side of the Court to be there disposed of. As to the witnesses named in the cost bill, excepting three, were called and used in the first hearing which resulted in a determination of the equitable issue in favor of the petitioner.

It would seem inequitable to tax the costs of the plaintiff so then incurred against the petitioner.

When the case was transferred to the law side of the Court and the petitioner after the hearing on the question of damages fails by reason his refusal to properly frame his petition to state a legal cause of action, then all costs there incurred by the plaintiff should be taxed against him, the items of which are:

Roy Woodbridge	$11.40
Roy McClure	12.20
R. W. Rothwell	13.00

Together as subsistence charges of $6.00 for each of the three witnesses in the aggregate $18.00.

An order will be also entered allowing said subsistence charges to the three witnesses above referred to, as such order can be made at this time.

The order of the Clerk is modified, taxing plaintiff's costs against the petitioner in the total sum of $54.60.

(Title of Court and Cause)

ORDER

Filed July 13, 1938.

It satisfactorily appearing to the Court that Roy Woodbridge, Roy McClure and R. W. Rothwell, witnesses who appeared and testified on behalf of the plaintiff at the

trial of the above entitled cause are entitled to, as expenses of subsistence for two days of actual attendance, of the sum of $3.00 per day in addition to the regular witness fees and mileage provided by law.

Dated July 13, 1938.

CHARLES C. CAVANAH,
District Judge.

(Title of Court and Cause)

ORDER

Filed July 13, 1938.

In Harmony with memorandum opinion filed on this date, it is ORDERED that the costs herein incurred by the plaintiff should be taxed against the petitioner W. A. Nielsen as follows: Roy Woodbridge, $11.40; Roy McClure, $12.20; R. W. Rothwell, $13.00; together with subsistence charges of $3.00 per day for two days for each of the three witnesses, making a total costs taxed in favor of the plaintiff and against the Petitioner, Nielsen of $54.60.

Dated July 13, 1938.

CHARLES C. CAVANAH,
District Judge.

(Title of Court and Cause)

PETITION FOR APPEAL.

Filed Aug. 2, 1938.

Comes now Wilse A. Nielson, petitioner herein, and states that on or about the 23rd day of February, 1937, he made and filed herein a petition directed against the plaintiff, Utah Construction Company, named as defendant in said petition, and that thereafter, and on or about the 3rd day of May, 1938, this Court entered an order and judgment in favor of the said Utah Construction Company, named as defendant in said petition in this action, and against this petitioner, dismissing the said petition, and in which order and judgment and proceedings had thereunder in this cause, certain errors were committed to the prejudice of this petitioner, all of which errors will appear more in detail from the Assignment of Errors which is filed with this Petition.

WHEREFORE this petitioner prays that an appeal be allowed in his behalf to the United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors specified, and that a transcript of the record, proceedings and papers in said cause, duly authenticated, be sent to the Circuit Court of Appeals, and that citation issue as provided by law, and your petitioner further

prays that the proper order relating to the required bond to be furnished by him be made herein.

D. A. SKEEN,
Attorney for Petitioner.

(Service acknowledged August 2, 1938.)

(Title of Court and Cause)

ASSIGNMENT OF ERRORS

Filed Aug. 2, 1938.

Comes now the above named petitioner, appellant herein, and files his Assignment of Errors committed in the trial and proceedings of the above entitled cause, to-wit:—

I.

The Court erred in making and entering its order of March 10, 1938, dissolving the temporary injunction theretofore issued and transferring the petition of petitioner to the law side of the Court to be thereafter disposed of.

II.

That the Court erred in sustaining and granting the motion of the plaintiff, Utah Construction Company, (defendant in this proceeding) to strike and dismiss the petition of petitioner herein on the grounds in said motion set out, or on any ground whatever.

III.

That the Court erred in making and entering its judgment and order of dismissal herein, on the 3rd day of May, 1938, dismissing plaintiff's petition herein, as amended.

IV.

The Court erred in making and entering its judgment and order herein awarding the plaintiff, Utah Construction Company (defendant in this proceeding) its costs and disbursements.

V.

The Court erred in overruling and denying the motion of petitioner herein to strike the bill of costs as filed herein by Utah Construction Company and overruling the petitioner's objection to costs filed herein.

VI.

The Court erred in overruling and denying the appeal of the petitioner herein from the order and ruling of the Clerk of the Court in taxing costs herein, the Court having dismissed the said petition for lack of jurisdiction to entertain and determine the same.

VII.

The Court erred in entering an order allowing expenses and sustenance charged to witnesses, there being no proper application or showing made to the Court as a basis for such order.

VIII.

The Court erred in refusing to make and enter speci-

fic findings of fact and conclusions of law, pursuant to the opinion of the Court made and rendered herein, finding and determining the issues on said petition as to the construction and enforcement of the said decree in favor of the petitioner herein.

IX.

The Court erred in concluding and ruling as a matter of law that the Court was without jurisdiction to hear and determine the issues presented by the petition of petitioner, and the answer of the Utah Construction Company to said petition, and in dismissing said petition.

D. A. SKEEN,
Attorney for Petitioner.

(Service acknowledged August 2, 1938.)

(Title of Court and Cause)

ORDER ALLOWING APPEAL.

Filed Aug. 2, 1938.

Upon the motion of the petitioner, appearing by his attorney, D. A. Skeen, IT IS ORDERED that the appeal of the petitioner above named be allowed as prayed for by the petitioner in said cause.

AND IT IS FURTHER ORDERED that the amount

of the bond be fixed in the sum of Three hundred dollars, ($300.00) as security for plaintiff's costs on appeal, and it is so ordered.

IT IS FURTHER ORDERED that a transcript of the record be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California.

Dated this 2nd day of August, 1938.

CHARLES C. CAVANAH,
Judge.

(Service accepted August 2, 1938)

(Title of Court and Cause)

CITATION ON APPEAL

Filed Aug. 2, 1938.

THE PRESIDENT OF THE UNITED STATES to UTAH CONSTRUCTION COMPANY, a corporation, and to A. E. BOWEN, Salt Lake City, Utah, and EDWIN SNOW, Boise, Idaho, its attorneys, GREETINGS:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the city of San Francisco in the State of California within thirty days from the date

hereof pursuant to Order allowing Appeal regularly issued, and which is on file in the office of the Clerk of the District Court of the United States for the District of Idaho, Eastern Division, in action pending in said court wherein Wilse A. Nielson is appellant and Utah Construction Company, a corporation, is appellee, and to show cause, if any there be, why the judgment and proceedings in said Order mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESSETH: the Honorable Charles Evans Hughes, Chief Justice of the Supreme Court of the United States of America, this 2nd day of August, 1938.

CHARLES C. CAVANAH,
District Judge.

ATTEST
W. D. McREYNOLDS,
(Seal) Clerk.

(Service admitted August 2, 1938)

(Title of Court and Cause)

UNDERTAKING ON APPEAL

Filed Aug. 2, 1938.

KNOW ALL MEN BY THESE PRESENTS, that we, Wilse A. Nielson, as principal, and the UNITED STATES FIDELITY AND GUARANTY COM-

PANY, a corporation organized and existing under and by virtue of the laws of the State of Maryland, as surety, are firmly held and bound unto the Utah Construction Company, plaintiff, in the sum of three hundred Dollars, ($300.00), to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, our heirs, executors and assigns.

WHEREAS, the petitioner in the above entitled cause has appealed to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, from a judgment rendered in the District Court of the United States, for the District of Idaho, Eastern Division, which judgment was made and entered on the 3rd day of May, 1938, wherein and whereby Utah Construction Company, a corporation, was plaintiff, John F. Abbott, et al., were defendants, and Wilse A. Nielson was petitioner.

NOW, THEREFORE, the condition of the above obligation is such that if the said Wilse A. Nielson shall prosecute said appeal to effect and answer all costs if he fails to make good his plea, then the obligation shall be void, otherwise to remain in full force and effect.

Dated this 2nd day of August, 1938.

Wilse A. Nielson,

(SEAL) Principal.

UNITED STATES FIDELITY & GUARANTY COMPANY,
By Henry Whitson,
Attorney in fact.

STATE OF IDAHO)
) ss.
COUNTY OF ADA)

Henry Whitson, being first duly sworn, on oath, deposes and says, that he is attorney-in-fact of the UNITED STATES FIDELITY AND GUARANTY COMPANY, and that he is duly authorized to execute and deliver the foregoing obligation; that said Company is authorized to execute the same, and has complied in all respects with the laws of Idaho in reference to becoming sole surety upon bonds, undertakings and obligations

Henry Whitson,

Subscribed and sworn to before me this 2nd day of August, 1938.

(SEAL) W. D. McReynolds,
Clerk.

The foregoing bond is hereby approved this 2nd day of August, 1938.

CHARLES C. CAVANAH,
Judge.

(Service acknowledged—August 3, 1938.)

(Title of Court and Cause)

CERTIFICATE.

Filed August 4, 1938.

The annexed proposed "statement of case" having been on August 3, 1938, presented to me for consider-

ation by counsel for the petitioner, and counsel for the plaintiff having declined to sign or agree to the same, and that it does not contain a complete, full and correct record of the proceedings had in the cause, as there was considerable testimony presented to and taken in Court, none of which is referred to or made a part of said proposed statement.

Therefore, the Court declines to settle the same.

Dated August 4, 1938.

CHARLES C. CAVANAH,
District Judge.

STATEMENT OF CASE.

In this matter the petitioner, Wilse A. Nielson, on the 23rd day of February, 1937, filed in this Court a petition which is to be printed herein as part of this statement.

That on the filing of said petition, on the 23rd day of February 1937, the Court made and entered its order which is to be printed herein as a part of this statement.

That thereafter plaintiff, Utah Construction Company, the party against whom the said petition of Wilse A. Nielson was directed, filed its answer to said petition, which answer was subsequently, on March 26, 1937, superceded by an amended answer to the petition of Wilse A. Nielson, filed herein, to be printed herein as a part of this statement.

That thereafter, on the 26th day of March, 1937, said petitioner, Wilse A. Nielson, filed his reply to said

amended answer, which is to be printed herein as a part of this statement.

That in said petition it was set out and recited, among other things, that on the 15th day of March, 1923, a decree was entered in said action, adjudicating 6.4 second feet of water as appurtenant to the land now owned by petitioner, and by the terms of said decree the plaintiff, in the exercise of its rights under said decree, to the extent of its appropriations, was granted permission to impound and divert certain waters of Big Lost River, when by so doing it did not interfere with the exercise of the prior rights of the decree, and specifying that the water released by plaintiff from storage should be conveyed thru the natural channel of the Big Lost River to the points of use. The petitioner further set out that there was ample water in the said Big Lost River to fully supply petitioner's rights, and that the plaintiff Utah Construction Company and the water commissioner appointed by the Court were misinterpreting the decree and in its administration were interferring with plaintiff's prior rights and depriving him of water by reason of which he had sustained and was sustaining substantial damages, and the plaintiff, its agents and successors, were threatening to continue to violate the said decree. The petition further set out that the Court rendering said decree had reserved jurisdiction to supervise and enforce the administration of the said decree.

The Utah Construction Company, by way of answer to this petition, denied that the petitioner's rights had been

in any way interferred with, and further set out that during the year 1936 the plaintiff had sold, and by deed, conveyed to the Big Lost River Irrigation District, all of its right, title and interest in and to the waters of Big Lost River, the reservoir, canals and all diverting works. This allegation as to conveyance and transfer by the plaintiff was admitted as alleged.

That thereafter, the said matter came on for hearing on the said petition and answer as amended, and after hearing thereon, the Court on July 7, 1937, rendered its opinion, which is to be printed herein as a part of this statement.

That pursuant to said opinion, on the 9th day of July, 1937, the Court made, entered and filed its order, which is to be printed herein as a part of this statement.

That thereafter, on the 1st day of November, 1937, a further hearing of said matter was called and hearing was had on the questions of damages, reserved by the Court for consideration, and, during the course of such proceedings and hearing, the minutes of the Court pertaining to said matter were made, entered, recorded and signed, and which are to be printed herein as a part of this statement.

That the matter was argued and taken under advisement by the Court, and thereafter, on January 11, 1938, the Court rendered and filed its opinion herein, which opinion is to be printed herein as a part of this statement.

That thereafter, on the 20th day of January, 1938, the

petitioner herein made and filed his amended petition, which order is to be printed as a part of this statement.

That thereafter, on the 29th day of January, 1938, the Utah Construction Company filed its motion to dismiss the amended petition of Wilse A. Nielson, and to strike the same, which motion is to be printed herein as a part of this statement.

That thereafter, on March 10, 1938, the Court, pursuant to said opinion, made and entered its order herein, which order is to be printed as a part of this statement.

That thereafter on the 3rd day of May, 1938, the Court made and entered its order, sustaining the said motion to dismiss and to strike, and dismiss the said petition with costs to the Utah Construction Company, all pursuant to the opinion of the Court that day rendered, which opinion and order are to be printed herein as a part of this statement.

That thereafter, on the 9th day of May, 1938, the Utah Construction Company made and filed its memorandum of costs, which is to be printed herein as a part of this statement.

That thereafter petitioner, Wilse A. Nielson, made and filed his motion to strike the said memorandum of costs, which motion is to be printed herein as a part of this statement.

That thereafter, on the 24th day of June, 1938, petitioner, Wilse A. Nielson, made and filed his motion to

require the Court herein to make specific findings of fact and to amend the judgment and order of dismissal entered on the 3rd day of May, 1938, to eliminate from said judgment that portion awarding costs against petitioner, which motion is to be printed herein as a part of this statement.

That thereafter, on the 24th day of June, 1938, petitioner, Wilse A. Nielson, made and filed his motion to strike from the files, the memorandum of costs and disbursements, on the ground of lack of jurisdiction of the court to tax costs, and on other grounds, which motion is to be printed herein as a part of this statement.

That thereafter, on the 28th day of June, 1938, the Clerk taxed costs against petitioner in the sum of $358.00, which order is to be printed herein as a part of this statement.

That petitioner immediately appealed to the Court from such order taxing costs, which notice of appeal is to be printed herein as a part of this statement.

That the minutes of the Court on said hearing on the 28th day of June, 1938, pertaining to said matter were made, signed and filed, and the exceptions to all rulings thereon duly allowed to petitioner, which minutes are to be printed herein as a part of this statement.

That thereafter, on the 13th day of July, 1938, the Court rendered an opinion on the motion to retax costs and entered an order reducing the amount as taxed by

the Clerk to the sum of $54.60, and also an order allowing subsistence to three witnesses for a period of two days, which opinion and orders are to be printed herein as a part of this statement.

That to each and all of the rulings of the Court hereinabove set out, the petitioner is allowed an exception by the Court, and such exception is preserved for the purpose of appeal by the approval of this statement by the Court.

It is hereby stipulated that the foregoing statement, showing how the questions arose and were decided by the trial court, may be submitted to the Court for approval as the record on appeal herein.

D. A. SKEEN,
Attorney for Petitioner.

.....

Attorney for Plaintiff.

The foregoing statement, showing how the questions arose and how such questions were decided by this Court, is hereby approved by the Court, as presenting the record herein on appeal to be copied and certified to the Circuit Court of Appeals as the record on appeal herein.

Dated this.....day of August, 1938.

.....

Judge.

(Title of Court and Cause)

PRAECIPE FOR APPEAL.

Filed August 3, 1938.

TO THE CLERK OF THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF IDAHO:

Sir:

You will kindly prepare and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, a properly authenticated record of appeal in the above entitled cause, including therein the following documents:

(1) Petition of Wilse A. Nielson, filed February 23, 1937.

(2) Order of Court, dated February 23, 1937.

(3) Amended Answer of Utah Construction Company to said petition.

(4) Reply of petitioner to amended answer of Utah Construction Company.

(5) Opinion of Court dated and filed July 7, 1937.

(6) Order dated and filed July 9, 1937.

(7) Minutes of the Court of proceedings on November 1st, 1937.

(8) Opinion of Court dated and filed January 11, 1938.

(9) Amended petition of Wilse A. Nielson, filed January 21, 1938.

(10) Motion of Utah Construction Company to dismiss Amended Petition.

(11) Order of Court dated and filed March 10, 1938.

(12) Opinion and Order of Court dated and filed May 3, 1938.

(13) Memorandum of costs filed by Utah Construction Company.

(14) Motion of Wilse A. Nielson to strike memorandum of costs.

(15) Motion of Wilse A. Nielson, filed June 25, 1938.

(16) Motion of Wilse A. Nielson, filed June 25, 1938, to strike memorandum of Costs.

(17) Order of Clerk taxing costs, dated June 28, 1938.

(18) Notice of appeal from order of Clerk taxing costs.

(19) Objection to costs filed by Wilse A. Nielson.

(20) Minutes of the Court of proceedings on June 28, 1938.

(21) Opinion of the Court, dated and filed July 13, 1938.

(22) Orders of Court dated and filed July 13, 1938.

(23) Petition for appeal.

(24) Assignment of Errors.

(25) Order allowing appeal.

(26) Citation.

(27) Undertaking on appeal.

(28) Praecipe for appeal.

(29) Statement of case, as proposed.

(30) Any other file, paper or assignment required to be incorporated in the transcript of record herein under the practice of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated July 30, 1938.

D. A. SKEEN,
Attorney for Petitioner.

(Service acknowledged August 3, 1938.)

(Title of Court and Cause)

CERTIFICATE OF CLERK

I, W. D. McREYNOLDS, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 101, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the Praecipe filed herein.

I further certify that the cost of the record herein amounts to the sum of $123.55 and that the same has been paid by the appellant.

Witness my hand and the seal of said Court this 22nd day of September, 1938.

(SEAL) W. D. McREYNOLDS,
Clerk.

No. 8987

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILSE A. NIELSON,

Appellant,

vs.

UTAH CONSTRUCTION COMPANY,
a corporation,

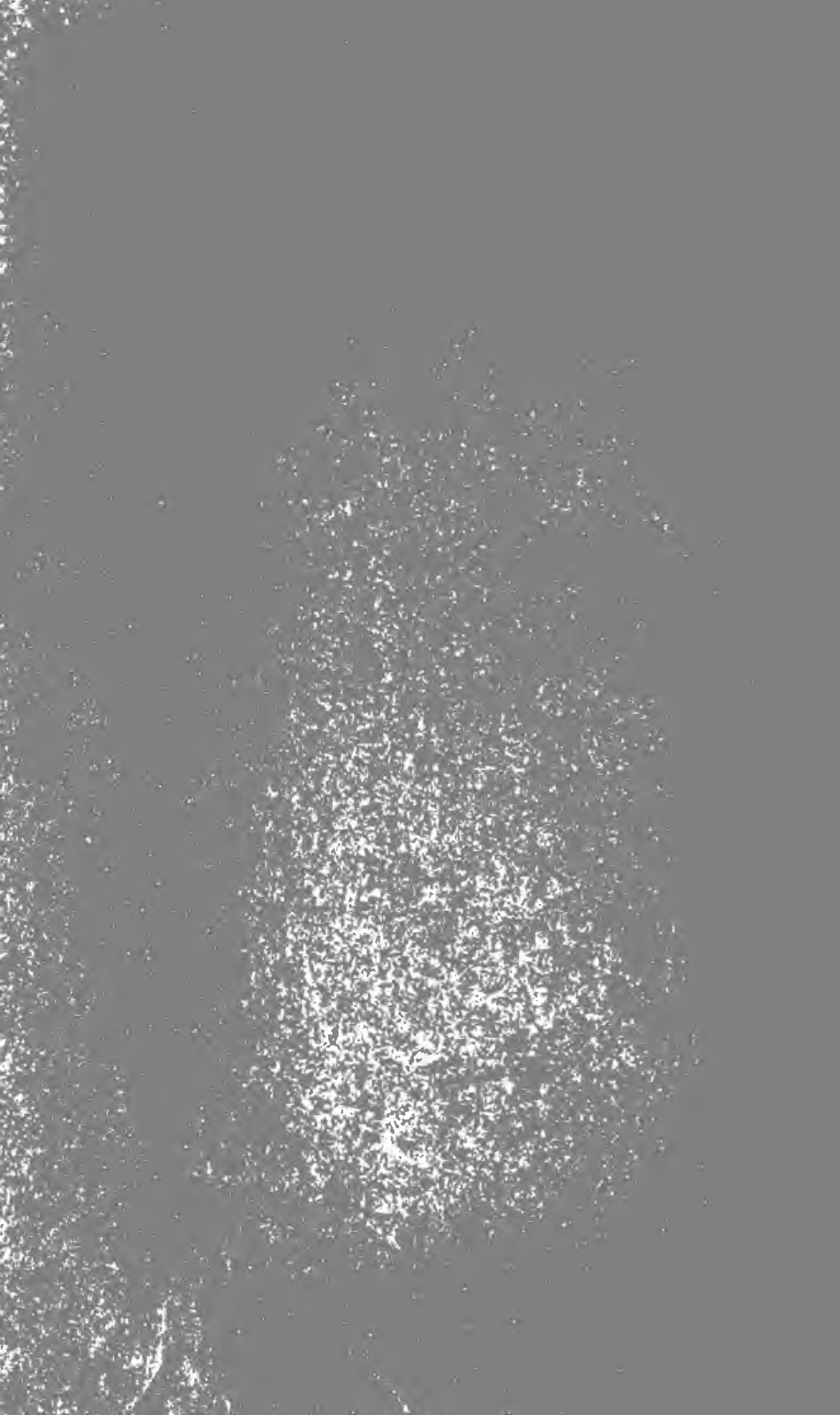
Appellee.

BRIEF OF APPELLANT

D. A. SKEEN, Salt Lake City, Utah,
Attorney for Appellant.

On Appeal from the District Court of the United States for the District of Idaho, Southern Division.

Honorable Charles C. Cavanaugh, District Judge



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vs.

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Appellee.

BRIEF OF APPELLANT

D. A. SKEEN, Salt Lake City, Utah,
Attorney for Appellant.

On Appeal from the District Court of the United States for the District of Idaho, Southern Division.

Honorable Charles C. Cavanaugh, District Judge

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BRIEF OF APPELLANT

On Appeal from the District Court of the United States for the District of Idaho, Southern Division.

Honorable Charles C. Cavanaugh, District Judge

D. A. SKEEN, Salt Lake City, Utah,
Attorney for Appellant.

STATEMENT OF PLEADINGS

An original action was filed by the Utah Construction Company, a Utah corporation, in the District Court against John F. Abbott and many other water claimants on the Big Lost River system in Idaho for the purpose of securing an adjudication of the water rights of the Big Lost River in Butte County, State of Idaho. A decree in the original action was entered on the 15th day of

March, 1923, by which certain water rights were decreed to certain lands. The petitioner herein, in February, 1937, filed a petition in the original action (Tran. 1) setting forth that he had become the owner of these certain lands and the water rights decreed to them and further setting forth that the court in the original decree had expressly reserved jurisdiction to supervise and enforce the administration of the decree and further setting forth that the Utah Construction Company had controlled the administration of the decree and, in violation of the terms of the decree, had wrongfully diverted and used water otherwise decreed to the land acquired by the petitioner from Louis T. Miller, one of the land and water owner defendants, to the extent and with the result that through the wrongful diversion of the said waters by the Utah Construction Company in disregard of the rights of the petitioner and in violation of the decree, the water decreed to the petitioner was taken by the plaintiff, Utah Construction Company, away from the petitioner's lands and the water level lowered, the streams dried up and the crops planted on petitioner's land were destroyed and the petitioner was damaged.

The petitioner prayed for an order requiring the plaintiff, Utah Construction Company, its officers and agents to show cause why they had not complied with the terms and provisions of the decree and permitted sufficient water to flow down the channel of the Big Lost River to fill the petitioner's rights; and petitioner further prayed for an order fixing a time and place for deter-

mination of the claims of petitioner for damages sustained in the loss of crops by reason of the wrongful diversion and use of the water, by the Utah Construction Company, decreed to petitioner and the land acquired by him. On this petition the court issued an order requiring the Utah Construction Company to show cause at a time certain why the prayer of the petition should not be granted.

The Utah Construction Company filed an answer and an amended answer (Tran. 11) to this petition in which they admitted the entry of the decree and the reserved jurisdiction by the court to administer the decree and alleged the priority of right granted to the Utah Construction Company by the original decree and denied that it had wrongfully diverted or used any water from Big Lost River and denied that the petitioner had sustained any damage by reason of any wrongful diversion or use of the said waters of Big Lost River by any person.

By way of further answer, the Utah Construction Company alleged that during the month of July, 1936, it sold and assigned and transferred all rights decreed to it or growing out of the said decree to the Big Lost River Irrigation District, an Idaho corporation, and denied that it had any intention of storing or diverting any water affected by the said decree and alleged that the said decree had always been properly construed and interpreted and the administration of such decree had been acquiesced in by all parties to the decree.

A reply was filed by petitioner (Tran. 22) denying that he had ever acquiesced in the wrongful interpretation of the decree and the wrongful diversion of the water under the said decree. A hearing was called and had on this matter; evidence was introduced and the court rendered a written opinion and decision (Tran. 24) and among other things the court found and determined that the plaintiff, Utah Construction Company, had wrongfully interpreted the decree and wrongfully diverted the water to which the petitioner was entitled and had failed to discharge the burden placed upon the Utah Construction Company of proving that the wrongful diversion and use of the water, contrary to the terms of the decree, had not resulted in damage to the petitioner and on such determination entered an order (Tran. 33) providing, among other things (Tran. 34-35):

> "That the plaintiff, Utah Construction Company, its successors in interest, the Big Lost River Irrigation District, and all of the agents, servants, employees and attorneys for the plaintiff, Utah Construction Company, and its successors in interest, the Big Lost River Irrigation District, and any person administering the decree herein, are hereby enjoined and restrained from in any manner interferring with the natural flow waters of Big Lost River as determined by the terms of the decree herefore entered herein, until the petitioner, Wilse A. Nielson, has had delivered into the intake of the Miller Ditch, 6.4 C. F. S. of the waters of Big Lost

River, to fill his said right under said decree, and the said plaintiff, Utah Construction Company and the Big Lost River Irrigation District, and all of their agents, servants, employees and attorneys and any Commissioner or other person administering the decree herein are required to deliver at the 2-B gauging station specified in said original decree 34 C.F.S. as natural flow water without deduction for water diverted into any ditch above the said 2-B gauging station, and to carry all of the said natural flow water of the Big Lost River down the main channel of Big Lost River under all conditions as they existed at the time the said original decree was entered herein, and without any diversion whatever from the main channel of the Big Lost River by means of by-pass or other diversion canals, or ditches used, or intended to be in any manner used, for diverting water from the main channel of Big Lost River around any portion of said channel, or for any use whatever until there has been delivered into the intake of the said Miller Ditch for petitioner's use on his said land 6.4 C. F. S. of the waters of Big Lost River.

"And it is further ordered that said injunction continue during the pendency of this proceeding, and that Findings of Fact, Conclusions of Law and Decree are to be considered and entered after the question of damages is heard and determined as provided for in the written opinion of the Court so filed."

The matter came on for hearing on November 1st pursuant to the order of the Court setting down for trial the matter of the damages claimed by petitioner and the plaintiff, Utah Construction Company, moved the Court orally (Tran. 36) to vacate the previous order and dismiss the petition. This matter was argued and the motion denied by the court.

The Court then, on November 1st, 1937, pursuant to its previous opinion and order, proceeded to hear evidence as to the extent of the damages sustained by the petitioner by reason of the violation of the decree and wrongful diversion of the water by Utah Construction Company. At the conclusion of this hearing, after the evidence was taken, the Court took the matter under advisement and rendered a written opinion (Tran. 37) which, among other things, provided as follows (at Tran. 43):

> "An analysis of the petition seems to contain averments seeking both equitable and legal relief. In other words, the allegations relate to the violation and a continuation of a violation of the original decree in the wrongful diverting of waters of the stream which deprived the petitioner of his decreed prior right to his damage in the sum of $12,500.00 for an Order of the Court directing delivery to him of the water decreed, and prays for an order that the Company show cause why it has not complied with the provisions of the decree, for damages and such orders as are proper and necessary to the

> proper administration of the decree and the distribution of water thereunder according to the terms of the decree."

And further provided (Tran. 47):

> So the present proceeding being now transferred to the law side of the Court and the petition in its present condition not stating facts sufficient to give the Court jurisdiction for want of diversity of citizenship being alleged, the same will be dismissed unless the petitioner, by amendment made within 10 days alleging sufficient facts showing diversity of citizenship under equity rule 19, and if such is done, the law issue as to damages will be tried by a jury unless a jury trial is waived. * * *"

And on March 10th, pursuant to this opinion, the Court entered an order (Tran. 61) denying the injunctive relief prayed and transferring the petition for the determination of damages to the law side of the court.

On January 21, 1938, pursuant to the opinion and order of the court, the defendant filed an amended petition (Tran. 48) setting forth that on the filing of the original action the Utah Construction Company was a Utah corporation and citizen of the State of Utah and the defendants were all citizens of the State of Idaho and that the action was filed for the purpose of quieting title to water and water rights, all within the State of Idaho. That the defendants were served with process or voluntarily appeared so that the court acquired complete jurisdiction of the parties and the subject-matter and that

the decree entered adjudicated all rights between the parties and decreed to plaintiff, Utah Construction Company, certain water rights to be used for beneficial purposes, and enjoining the plaintiff, its agents and successors in interest from diverting or storing or using the water except for beneficial purposes and in strict accordance with the terms of the decree; and further set out that the plaintiff had succeeded to the ownership of the land and all water rights owned and decreed to Louis T. Miller, a defendant in the original action. The said amended petition further set out that Wilse A. Nielson, upon acquiring the said property became a citizen of the State of Idaho, residing on the said land in Butte County, Idaho, and then alleged the wrongful use, diversion and storage of the water as set out in the original petition and the resultant damage in the loss of crops to the petitioner; and further alleged that by reason of the acts of the Utah Construction Company and the Big Lost River Irrigation District as successor in interest to the Utah Construction Company, it was necessary that the court exercise its retained and inherent jurisdiction to enforce the proper construction of the decree and there was ample water available to irrigate the petitioner's land if the decree were properly enforced.

The petition then prayed for an order making the Big Lost River Irrigation District, as successor in interest to the Utah Construction Company and within the perview of the decree, a party to the proceeding and

requiring it to answer the petition and making it subject to the decrees and orders and praying for an order construing and enforcing the decree and awarding the petitioner a judgment for damages sustained in the loss of crops by reason of the violation of the decree. The petition also prayed for general relief.

On January 31, 1938, the Utah Construction Company filed a motion (Tran. 59) to dismiss the amended petition on the following grounds:

1. That the amended petition did not conform to the leave granted by the court in the court's opinion.

2. That the amended petiton did not show the requisite diversity of citizenship between the petitioner and the Utah Construction Company necessary to give the Court jurisdiction to determine the petitioner's claim for damages.

3. That the petition in equity sought to bring in the Big Lost River Irrigation District as an additional party.

4. That the amended petition did not state facts sufficient to constitute a cause of action in equity against the Utah Construction Company.

5. That in the amended petition there was more than one defendant and different liabilities asserted as to each.

This motion was taken under advisement and on May 3, 1938, the court rendered a further opinion (Tran. 62) which, among other things, stated:

> "It will be observed by the opinion of the Court of January 11, 1938, plaintiff was granted permis-

sion to amend his petition alleging sufficient facts showing a diversity of citizenship and to comply with the rules relating to the transfer of actions from the equity side of the Court to the law side of the Court and if done then the law issue as to damages was to be tried by a jury, unless a jury was waived. So the only remaining question now before the Court on the motion of the defendant Utah Construction Company to dismiss and strike is, does the amended petition comply with the order and rules of the Court? While plaintiff in his amended petition continues to assert that the action is an equitable one and should still be heard as such, as the petition is one wholly ancillary and incidental to the original proceedings initiated by the Utah Construction Company in this court, it seems necessary for the Court to state again that such a position cannot be sustained after considering the allegation of the original and amended petitions and the evidence, and the case will now have to be finally disposed of in accordance with the rules of, and the conclusion reached by the Court in the opinion of January 11, 1938, and when so transferred to the law side of the Court it should be proceeded with such alterations in the pleadings as shall be essential."

And the court then, on May 3, 1938, following this opinion, entered the following order (Tran. 64):

"ORDER

"In harmony with memorandum opinion filed

on this date, the motion to dismiss and strike of the Utah Construction Company is sustained and the amended petition of the Petitioner Wilse A. Nielson is dismissed with costs awarded to the Utah Construction Company."

The Utah Construction Company then filed a memorandum of costs (Trans. 65) totalling $373.95 and the petitioner filed a motion (Tran. 72) to strike this cost bill and also by written motion, moved the Court to make specific findings of fact with respect to the violation of the decree by the Utah Construction Company and to amend the judgment and order made by the Court by striking therefrom the provision taxing costs against the plaintiff.

The clerk, on these motions (Tran. 75), taxed the costs and the petitioner appealed from the order of the clerk taxing the costs and on such appeal to the Court, the Court did, on July 13, 1938, retax the costs by reducing the amount of costs against the petitioner to the sum of $54.60 and an order was entered accordingly. (Tran. 81).

STATEMENT OF FACTS

The Utah Construction Company, a Utah corporation, in 1923, having acquired certain rights to the waters of Big Lost River by appropriation and otherwise, brought this original action in the United States District Court for Idaho against resident land owners and water claimants in the State of Idaho. The jurisdiction of the federal court was based solely on diversity of citizenship.

A decree was entered adjudicating all of the water rights on the river system and allowing the Utah Construction Company to store and divert and use water, subject to the prior vested rights of the defendants and the decree was made operative and effective as against the Utah Construction Company, its officers, agents, attorneys and successors in interest. After the decree was entered, the petitioner and appellant acquired some 300 acres of land to which there had been decreed a right to 6.4 second feet of water, delivered from the channel of the Big Lost River Irrigation District into the head of the Miller Ditch on petitioner's ground. The Court, by the decree, reserved jurisdiction and appointed a water commissioner to administer the decree. The petitioner claims that the decree as entered permitted the diversion of water under certain conditions only and required that all water be carried at the main channel of the Big Lost River to the points of diversion and that the Utah Construction Company caused the water to be diverted and used in violation of the terms of the decree with the result that the water decreed to petitioner's land was withheld from him and the water level on his land lowered, the trees, crops, shrubbery and vegetation dried up and destroyed to his damage in a sum in excess of $10,000.00.

The amended petition prayed for an order construing and enforcing the decree and punishing all parties guilty of violation of the said decree and compelling strict compliance with the decree and all its terms.

This amended petition was never answered but was met with a motion to dismiss on the ground that it did not state facts sufficient to constitute a cause of action and on the ground that it failed to show diversity of citizenship between the petitioner, Wilse A. Nielson, and the Utah Construction Company sufficient, to ground jurisdiction in the United States District Court for Idaho.

The Court, on the original petition, had, by its opinion, specifically stated and recited that the decree had been violated by and under the direction of the Utah Construction Company and that the petitioner had been deprived of water which, but for such violation of the decree, would have reached him. The Court had heard the evidence but had never determined before the amended petition was filed the extent of the petitioner's damage. The Court had previously determined that in 1936 the Utah Construction Company had assigned and transferred all rights acquired by it under the decree to the Big Lost River Irrigation District, an Idaho corporation. The Court sustained the motion to dismiss the petition apparently on the ground of lack of diversity of citizenship between the petitioner, Wilse A. Nielson, and the Utah Construction Company.

Petitioner, Nielson, was an assignee and successor in interest of the rights of Louis T. Miller, a party defendant and a resident and citizen of the State of Idaho at the time the original action was filed by the Utah Construction Company, a Utah corporation, under which

action the original jurisdiction attached.

The Court, in effect, by dismissiong the petitions of the petitioner, held that under the recitals of the petition of Wilse A. Nielson, a successor in interest to one of the original parties to the action, had no standing in the Court for relief against violations of the original decree by the original plaintiff (the alleged violations being admitted by the motion of the original plaintiff), Utah Construction Company, appellee, over which it was conceeded the Court in entering the original decree had jurisdiction, because the Utah Construction Company had transferred its interest to the Big Lost River Irrigation District, a corporation of the State of Idaho. In other words, the petitioner had to show diversity of citizenship, not between the original parties but between their assigns and successors in interest in the subject-matter of the litigation in order to give the court jurisdiction.

ASSIGNMENTS OF ERROR

All of the Assignments of Error are to be relied upon and these assignments appear on page 86, 87 and 88 of the transcript.

ARGUMENT

This appeal challenges the ruling of the court dismissing the petition of the petitioner for relief against violations of the decree and threatened continued violations of the decree by the appellee, Utah Construction Company, as the plaintiff, in the original action and its officers, agents, assigns and successors in interest, and

for further relief by way of damages for loss of crops sustained by petitioner as a result of the violation of the decree by the Utah Construction Company.

The appeal also challenges the decision of the Court, after determining that the decree had been violated by the Utah Construction Company and that the petitioner had a right to claim damages, that the Court had no jurisdiction because there was no diversity of citizenship shown between the petitioner and the original plaintiff, Utah Construction Company, awarding costs against the plaintiff.

The ruling of the court in effect is a judgment sustaining the motion on the ground that the amended petition does not state facts sufficient to constitute a cause of action in equity against the Utah Construction Company. By this motion all proper allegations of the petition are admitted as true. Briefly restated, the allegations of this amended petition to be tested in this way appear on page 48 of the transcript of the record and are as follows:

That the original plaintiff, Utah Construction Company, was a corporation and citizen of the State of Utah, and all of the original defendants were citizens of the State of Idaho. That the action was filed to quiet title and adjudicate the water rights to waters in Idaho. That the court decreed certain water rights to the plaintiff for beneficial use, subject to all prior rights and enjoining and restraining the Utah Construction Company, its successors and assigns from diverting or using the

water except in the manner and to the extent and for the purposes specified in the decree. That the Court by the original decree expressly reserved jurisdiction to supervise and enforce the administration of the decree. That at the time of the filing of the action, one Louis T. Miller owned certain land described to which was adjudicated 6.4 second feet of water to be diverted from the Big Lost River through the Miller Ditch. That under the said decree Utah Construction Company stored and diverted water and water decreed to the Miller land was delivered to it. That after said decree was entered and the water apportioned, the petitioner, Wilse A. Nielson, became a citizen of the State of Idaho, residing on the land and acquired the land and the water rights as successor to Louis T. Miller. That the Utah Construction Company wrongfully stored and diverted water to its own use and for its own benefit in disregard of the rights of the petioner and destroyed crops and vegetation growing and planted on the land of the petitioner and that in the year 1935 the Utah Construction Company entered into an agreement with Big Lost River Irrigation District, a corporation of the State of Idaho, by which the Big Lost River Irrigation District asserted certain interest in the water decreed to plaintiff, Utah Construction Company, and worked in conjunction with the water commissioner appointed under the continuing jurisdiction of the Court and diverted the entire flow of water from the Big Lost River into ditches and by-passes and away from the petitioner's land and have withheld the

waters from the river channel designated in the decree as the source of petitioner's supply. That the Big Lost River Irrigation District acting under authority and as successor to the plaintiff, Utah Construction Company, threatens to continue to violate the terms of the said decree and to wrongfully divert water from the main channel of the Big Lost River and to withhold the same from the petitioner. That by reason of the wrongful acts set out and committed, the petitioner had been damaged in an amount in excess of $10,000.00. That by reason of the acts of the plaintiff, Utah Construction Company and the threatened acts of the Big Lost River Irrigation District it is necessary that the court exercise its retained and inherent jurisdiction as set out in the decree to at all times enforce the proper construction of the decree and the administration thereof and that the rights decreed to the petitioner will be nulified under the conditions existing and that if the decree is properly enforced there is ample water to irrigate the petitioner's land and to raise and mature the crops growing thereon. Having in mind the original jurisdiction of the Court and the jurisdiction retained to administer the decree, we submit that there is no question but that the jurisdiction of the Court was properly invoked by this petition and these allegations of the amended petition, standing undenied, compel the Court to hear the claims and to protect the rights of the petitioner herein.

The assignments of error will be grouped for argument in the following manner: Assignments 1, 2, 3, and 9 appear as follows:

I.

"The Court erred in making and entering its order of March 10, 1938, dissolving the temporary injunction theretofore issued and transferring the petition of petitioner to the law side of the Court to be thereafter disposed of."

II.

"That the Court erred in sustaining and granting motion of the plaintiff, Utah Construction Company (defendant in this proceeding), to strike and dismiss the petition of petitioner herein on the grounds in said motion set out, or on any ground whatever."

III.

"That the Court erred in making and entering its judgment and order of dismissal herein, on the 3rd day of May, 1938, dismissing plaintiff's petition herein, as amended."

IX.

"The Court erred in concluding and ruling as a matter of law that the Court was without jurisdiction to hear and determine the issues presented by the petition of petitioner, and the answer of the Utah Construction Company to said petition, and in dismissing said petition."

These assignments go to the error of the court in granting the motion and in dismissing the amended petition. This order of the court is as follows:

"ORDER

Filed May 3, 1938

"In harmony with memorandum opinion filed on this date, the motion to dismiss and strike of the Utah Construction Company is sustained and the amended petition of the Petitioner Wilse A. Nielson is dismissed with costs awarded to the Utah Construction Company.

"Dated May 3, 1938.

CHARLES C. CAVANAH,
District Judge."

THE PETITION OF PETITIONER AND ALL PROCEEDINGS UNDER IT ARE ANCILLARY AND INCIDENTAL TO THE ORIGINAL CAUSE. The jurisdiction of the subject-matter and the parties, which attached upon the filing of the original action and the service or appearance of the defendants and existed at the time of the entry of the decree, continues in favor and against any party or the successor in interest in the subject matter of the action and cannot be affected by the transfer of interest by any party, or attempted withdrawal from the case.

These propositions are fundamental and have been announced many times by many courts. We direct the court's attention to the following cases with excerpts from some of them:

Fitz Simmons vs. Johnson, 90 Tennessee, 416: "Where a court has acquired full jurisdiction of a cause it retains it until the cause is finally deter-

mined. The exercise of the jurisdiction may be suspended but the jurisdiction itself is never suspended."

Venner vs. Pennsylvania Steel Company, 250 Federal, page 292, at Page 296:

"A generalization of the cases, presently noted, seemingly justifies the following, not as a precise classification, but an illustration of what constitutes ancillary jurisdiction in a federal court. It is a supplemental proceeding (a) to protect from interference with, and to determine conflicting claims to assets, within its administrative control, and (b) to control and regulate suits brought before it and to *restrain or enforce its judgments, or to further deal with the subject-matter thereof.* Any proceeding having one of the other of these objects in view intervening in an existing action, whether by bill petition, or motion, is dependent on the original suit, and the federal courts have cognizance thereof independent of any distinct ground of federal jurisdiction. Such jurisdiction may be invoked by a stranger to the original suit, and will not fail because new parties are brought in any more than a subsequent change in conditions arising pendente lite ousts the federal jurisdiction after it has once attached." (*Italics ours.*) Citing numerous cases, including Eicheel vs. U. S. F. & G., 245 U. S. 102, 62 L. Ed. 177, in which Justice Van de Vanter distinguishes between original and ancillary proceedings.

15 Corpus Juris, 822.

United States vs. Eisenbeis, 112 Federal, page 190. Mr. Justice Hawley, writing the opinion, stated at page 195:

"The jurisdiction of the state court to try the title to the property depended upon the condition of the parties, property, and affairs, connected therewith, at the time of the commencement of the suit, when its jurisdiction was invoked; and, its jurisdiction having attached to the parties and the subject-matter of the litigation, the subsequent happenings of events concerning the same, even if they were of such a character as would have prevented jurisdiction from attaching in the first instance, would not operate to oust the jurisdiction already regularly attached. In re Chetwood, 165 U. S. 443, 460, 17 Sup. Ct. 385, 392, 41 L. Ed. 782, 788; Bank vs. Stevens, 169 U. S. 432, 459, 18 Sup. Ct. 403, 413, 42 L. Ed. 807, 817; 12 Enc. Pl. & Prac. 171, and authorities there cited."

St. Louis San Francisco R. Co. v. Brynes, 24 Fed Rep. (2d) Page 66, at page 69, Justice Kenyon stated:

"The jurisdictional question is the only one involved in this appeal. What we say in this opinion relates in no way to the merits of the controversy. * * * If the Frisco Company's petition was dependent upon or ancillary to the original suit, or if jurisdiction had been reserved by the District Court in its

orders and decree confirming the receiver's sale, the Court had jurisdiction, regardless of lack of diversity of citizenship. The doctrine is stated by the Supreme Court in Wabash Railroad Co. vs. Adelbert College, etc., 208 U. S. 38, 54, 28 S. Ct. 182, 188 (52 L. Ed. 379), as follow:

'For the purpose of avoiding injustice which otherwise might result, a court during the continuance of its possession has, as incident thereto and as ancillary to the suit in which the possession was acquired, jurisdiction to hear and determine all questions respecting the title, the possession or the control of the property. In the courts of the United States this incidental and ancillary jurisdiction exists, although in the subordinate suit there is no jurisdiction arising out of diversity of citizenship or the nature of the controversy.'

"See Foster's Federal Practice (4th Ed.) Vol. 1, Sec. 21; Bradshaw et al vs. Miners' Bank of Joplin et al (C.C.A.), 81 F. 902; Krippendorf vs. Hyde, 110 U. S. 276, 4 S. Ct. 27, 28 L. Ed. 145."

Freeman vs. Howe, 65 U. S. 450, 16 L. Ed. 749, at page 752:

"The principle is, that a bill filed on the equity side of the court to restrain or regulate judgments or suits of law in the same court, and thereby prevent injustice, or an inequitable advantage under mesne or final process, is not an original suit, but ancillary and dependent, supplementary merely to

the original suit, out of which it had arisen, and is maintained without reference to the citizenship or residence of the parties."

Cincinnati R. Co. vs. Indianapolis R.R., 270 U. S. 107, 70 L. Ed. 490, at page 494:

"2. Where a bill in equity is necessary to have a construction of an order or decree of a Federal court, or to explain, *enforce* or correct it, such bill may be entertained by the court entering the decree, even though the parties interested for want of diverse citizenship could not be entitled by original bill in the Federal court to have the matter there litigated."

It must be remembered that here the court retained jurisdiction and administered the decree through its own water commissioner and it is alleged the acts of the water commissioner with the Utah Construction Company which violated the decree resulted in damage to petitioner. Under such circumstances the court always can and must control its own officer and make such orders as necessary to protect the rights of all parties affected by its officer's act. To this effect see Krippendorf vs. Hyde, 110 U. S. 276, 28 L. Ed. 145, quoting from an earlier case, the Court said: (at page 149)

"* * * 'Mr. Justice Miller, delivering the opinion of the court, said: 'Now this obviously refers to the control of the court over its own officer, in the execution of its own writs, and is as applicable to other misconduct of that officer in the execu-

tion of his official duties, as in cases of seizures of property not liable under an execution in his hands. The remedy needs no formal chancery proceeding, but a petition or motion, with notice to the sheriff, is not only all that is required, but is the most speedy and appropriate mode of obtaining relief. This relief does not depend upon any inadequacy of an action for damages or by sequestration. It is a short, summary proceeding before the court under whose authority the officer is acting, gives speedy relief and is very analogous to the statutory remedy given in many of the Western States in similar cases to try the right of property at the instance of the party whose property is wrongfully seized.'

"It is in this light, we think, that the court below should have regarded the present bill, not as an original bill invoking the general jurisdiction of the court in equity, but as an ancillary and dependent bill, equivalent in effect and purpose to a petition in the attachment proceeding itself, incident to and dependent upon it.

"The form of the proceeding, indeed, must be determined by the circumstances of the case. If the original cause, in which the process has issued, or the property or fund is held, is in equity, the intervention will be by petition pro interesse suo, or by a more formal but dependent bill in equity, if necessary. Relief, either in a suit in equity, or an action at law may properly be given, in some cases, in a

summary way, by motion merely supported by affidavits."

It is fundamental that when once the court acquires jurisdiction over a party to an action, that party may not divest the court of jurisdiction by assignment or transfer of the interest or otherwise. The main point urged in the motion of the Utah Construction Company was that the petition did not show diversity of citizenship between the Utah Construction Company and Wilse A. Nielson and that when the Utah Construction Company, a Utah corporation, assigned its interest to the Big Lost River Irrigation District, an Idaho corporation, the court lost jurisdiction. It is fundamental that a change of citizenship pending a suit does not affect the jurisdiction of the court based upon diversity of citizenship existing at the time the action was filed.

Simpkins Federal Practice, Third Edition, at page 124:

"Change of Citizenship Pending Suit, Effect of. It has already been stated that the jurisdiction is determined by the status of the parties when suit is begun. The uniform rule has been that no change of citizenship after suit begun will affect the jurisdiction; and this rule applies to either party. Nor will any change by assignment of the cause of action, pending the suit, whereby the parties in interest become citizens of the same State, nor will any change of parties holding in a fiduciary capacity, in any way affect the jurisdiction of the court once

obtained."

Wichita Railroad & Light Company v. Public Utilities Commission, 260 U. S. 48; 67 L. Ed. 124, at page 128:

"The intervention of the Kansas Company, a citizen of the same state as the Wichita Company, its opponent, did not take away the ground of diverse citizenship. That ground existed when the suit was begun, and the plaintiff set it forth in the bill as a matter entitling it to go into the district court. Jurisdiction once acquired on that ground is not devested by a subsequent change in the citizenship of the parties. Mollan v. Torrance, 9 Wheat. 537, 539, 6 L. ed. 154, 155; Clarke v. Mathewson, 12 Pet. 164, 171, 9L. ed. 1041, 1043; Koenigsberger v. Richmond Silver Min. Co. 158 U. S. 41, 49, 39 L. ed. 889, 892, 15 Sup. Ct. Rep. 751; Louisville, N. A. & C. R. Co. vs. Louisville Trust Co. 174 U. S. 552, 566, 43 L. ed. 1081, 1088, 19 Sup. Ct. Rep. 817. * * *"

St. Paul Mercury Indemnity Company vs. Red Cab Company ..... U. S. .....; 82 L. Ed. 541; 58 Supreme Court, 586.

The Assignments of Error Nos. 4, 5, 6, and 7 refer to the allowance of costs and are as follows:

IV.

"The Court erred in making and entering its judgment and order herein awarding the plaintiff, Utah Construction Company (defendant in this proceeding) its costs and disbursements.

V.

"The Court erred in overruling and denying the motion of petitioner herein to strike the bill of costs as filed herein by Utah Construction Company and overruling the petitioner's objection to costs filed herein.

VI.

"The Court erred in overruling and denying the appeal of the petitioner herein from the order and ruling of the Clerk of the Court in taxing costs herein, the Court having dismissed the said petition for lack of jurisdiction to entertain and determine the same.

VII.

"The Court erred in entering an order allowing expenses and sustenance charged to witnesses, there being no proper application or showing made to the Court as a basis for such order.

If the court did not have jurisdiction to hear and determine this petition, then it follows that it was without jurisdiction to award costs to either party. We direct the court's attention to the following cases:

Citizens Bank of Louisiana vs. Clifton Cannon, 164 U. S. 319; 41 L. Ed. 451. Mr. Justice Shiras delivering the opinion of the court with approval from an earlier case stated (at page 453):

"This court said: 'The court held that it had no jurisdiction whatever of the case, and yet gave a

judgment for the cost of the motion and ordered that an execution should issue to collect them. This was clearly erroneous. If there were no jurisdiction, there was no power to do anything but to strike the case from the docket."

Reliance Lumber Company vs. Rothschild, 127 Federal, 745 at page 749.

Lion Bonding and Surety Company vs. Karatz, 262 U. S. 640; 67 L. Ed. 1151.

Assignment of Error No. 8 is as follows:

"The Court erred in refusing to make and enter specific findings of fact and conclusions of law, pursuant to the opinion of the Court made and rendered herein, finding and determining the issues on said petition as to the construction and enforcement of the said decree in favor of the petitioner herein."

This assignment of error goes to the failure of the court to make and enter specific findings of fact and conclusions of law pursuant to the opinion of the court which found and determined that the decree had been violated and that the petitioner was entitled to a hearing as to the extent of the damage suffered by reason of such violation by the Utah Construction Company, appellee.

This matter is discussed by this court in the case of Parker et al vs. St. Sure, 53 Federal (2d) 706 and also National Reserve Ins. Company of Illinois vs. Scudder et al, 71 Federal (2d) 884.

Under the rules and these authorities the petitioner and appellee urges that the court erred in failing and re-

fusing to make specific findings and decree, especially because the decree runs to the parties and their successors in interest and the court, having jurisdiction of the subject matter and the parties, is bound to enforce the decree against and for the assignees or their successors in interest to the same extent and purpose as to the original parties to the action. The court in making its order in each instance herein referred to its written opinion and yet it is not clear whether such reference amounts to an adoption by the court of the opinion as its findings. The opinion and orders are set out in the record and are before this court for consideration on this appeal; and this court under the Scudder case above cited decided that it reserves the right in each case to decide whether the findings and conclusions as set forth in the opinion should be accepted in lieu of separate and distinct findings or whether the case should be returned to the trial court for appropriate findings. While this matter is not of primary importance since the court, by its order of dismissal of the amended petition refused to hear the petition of the petitioner, this whole matter can be corrected by this court reversing the trial court's order of dismissal and remanding the whole matter to the district court with directions to it to proceed and hear and determine and make findings, conclusions and decree on the issues presented by the amended petition, and when that is done, in the light of the evidence and the full proceeding, the petitioner can then have the correctness of those findings and the decree determined by another appeal if he so desires.

It is respectfully submitted that the judgment of the trial court should be reversed and petitioner awarded his costs and the cause remanded with directions to the trial court to exercise its reserved and retained jurisdiction and administer the decree in accordance with its terms as against and for the benefit of any party affected thereby and to proceed to hear and determine the rights of petitioner as set out and presented to the court in the amended petition.

Respectfully submitted,

D. A. SKEEN,
Attorney for Appellant.

In the United States Circuit Court of Appeals for the Ninth Circuit

WILSE A. NIELSON,
Appellant,

vs.

UTAH CONSTRUCTION COMPANY, a corporation,
Appellee.

No. 8987

BRIEF OF APPELLEE

On Appeal from the District Court of the United States for the District of Idaho, Eastern Division.

Honorable Charles C. Cavanah, District Judge.

A. E. BOWEN, Salt Lake City, Utah,

EDWIN SNOW, Boise, Idaho,
Attorneys for Appellee.

SUBJECT INDEX

TABLE OF AUTHORITIES

Cases:

TABLE OF AUTHORITIES—(Continued)

In the United States Circuit Court of Appeals for the Ninth Circuit

WILSE A. NIELSON,
Appellant,
vs.
UTAH CONSTRUCTION COMPANY, a corporation,
Appellee.
No. 8987

STATEMENT OF PLEADINGS

The "Statement of Pleadings" set forth in appellant's brief so much subordinates or omits the real issues made thereby, that appellee deems a restatement of the pleadings necessary.

In February, 1937 petitioner filed in the lower court his petition (R. 1) reciting in substance that he had succeeded to the ownership of certain land to which a water right in Big Lost River was decreed by the terms of a decree in the case in which the petition was filed, the decree being dated on or about March 15, 1923; that The Utah Construction Company, original plaintiff in the case, had by the terms of the same decree been alotted water rights in the same stream; that a water commissioner had been appointed by the court after the decree was entered to distribute the waters of Big Lost River and its tributaries, pursuant to the decree; that the plaintiff, The Utah Construction Company, had through the said water commissioner ever since the year 1929, and beginning in that year, caused large quantities of water decreed to the land of petitioner to be wrongfully stored and diverted, to petitioner's damage and over his protest; that in the year 1935 The Utah Construction Company (hereinafter frequent-

ly for brevity called "the company") and the court's commissioner —the latter acting under the company's direction and for its benefit—caused the entire flow of Big Lost River to be diverted from its channel and into the company's ditches so that the crops and vegetation on petitioner's land were destroyed; further, that during the year 1935 the company had entered into some agreement or arrangement with Big Lost River Irrigation District, a public corporation, the terms of which were not known or understood by petitioner, but under which the Big Lost River Irrigation District intended to continue to evade the decree and wrongfully divert and distribute the water decreed to petitioner's land (Par. 6, R. 5).

With repeated reiteration, it is alleged in the petition that the Utah Construction Company "intends to and unless enjoined by the court will ignore and disregard the decree"; and under some "further agreement" with the Big Lost River Irrigation District and in conjunction with the latter plans to divert plaintiff's water from the lands to which it was decreed and to transport it to other land and territory in violation of plaintiff's rights and the terms of the decree; that the company threatens to continue to violate the terms of the decree and is "now diverting and threatens to continue to divert water decreed to petitioner and will divert petitioner's water and destroy the crops" unless the court make and enter an order directing the delivery to petitioner forthwith of the water decreed to him; and that the crops now planted and those to be planted on petitioner's land will be wholly destroyed unless relief is granted petitioner as prayed for.

The petition also asserted that by reason of the past wrongful acts of The Utah Construction Company petitioner had been damaged in an amount in excess of $10,000.00 for which amount judgment is prayed.

It will thus be seen that the petition indicated on its face that the proceeding might very properly be considered ancillary to the main action and had to do with the enforcement of the decree previously entered. The trial court, acting upon such assertions

contained in the petition, made its order requiring the company to show cause, etc. (R. 10).

The company in its amended answer (R. 11), while admitting petitioner's ownership of the land described and the entry of the prior decree in the cause, set out other and further provisions of the decree in question; among such other provisions so set out were those awarding to the company rights prior and paramount to all other parties to the suit for the storage and subsequent use of the winter flow of the stream; the answer asserted that ever since the entry of the decree until the fall of 1936 the water had been distributed by the trial court's own commissioner, in a manner acquiesced in by petitioner and his predecessors, and without any objection or complaint to it, to the commissioner, or to the court, and that the court, in the exercise of its powers and functions as defined in the decree, had prior to the filing of the petition discharged its own commissioner and had turned the administration of the decree over to the Commissioner of Reclamation of the State of Idaho who had assumed jurisdiction of its administration and appointed watermasters; and the company denied in toto that it itself had ever had anything to do with the administration of the decree or that it had wrongfully diverted any of plaintiff's water at any time or at all.

But also (and more pertinently to the issues in this appeal) the company further answered that in July, 1936 and prior to the filing of Nielson's petition, it had sold and by deed conveyed and delivered to the Big Lost River Irrigation District all its right, title, and interest whatsoever in and to the waters of Big Lost River, as well as its reservoir, irrigation system, and all its lands, and in short all of its rights and property which were the subject matter of the decree; and that it did not "have or claim any right, title, or interest under said decree or otherwise in or to the waters or use of the waters of said Big Lost River and does not now store or use or intend in the future to store or use any of said water, and has no interest whatsoever in or under the decree" (R. 20).

Petitioner replied to the amended answer of the company, generally denying the affirmative matter pleaded and specifically denying any acquiescence by him in the method of administration of the decree as carried on by the officials appointed to administer it.

As will be seen from the foregoing, the company's answer put in issue the whole state of facts upon which the ancillary character of petitioner's proceeding depended. Since the company had prior to petitioner's proceeding sold and conveyed outright every vestige of property affected by the decree, its position herein is, was, and always has been that any proceeding against it looking to the enforcement of the decree or its interpretation must of necessity be wholly nugatory, as it was no longer a party to the decree and in no manner interested in it. Hence that the petition presented matters in no respect ancillary to the suit in which it was entitled; and that if entertained at all by the court it could only be entertained as an independent suit.

Upon the issues as above outlined between the petitioner and the company the cause was tried; neither the past nor present officials charged by law or the order of the court with the administration of the decree were made parties to the proceeding; neither was the Big Lost River Irrigation District, the then owner of all the rights originally decreed to The Utah Construction Company.

STATEMENT OF THE CASE

Petitioner's petition was dismissed by the trial court because it finally determined *from the evidence* that the proceeding was not, as claimed by appellant, ancillary to the main action in which it is entitled; further because, the trial court was without jurisdiction to entertain the petition as an independent action-diversity of citizenship between the parties being lacking; and still further because appellant refused to conform to the standing rules and the orders of the court below.

The printed record on appeal herein fails to set out either the

decree or any of the pleadings or other papers in the main case to which this proceeding has been claimed to be ancillary; there is also lacking in this record on appeal any statement of the evidence. The trial court declined to settle the purported "Statement of Case"

> "because it does not contain a complete, full, and correct record of the proceedings had in the cause as there was considerable testimony presented to and taken in court, none of which is referred to or made a part of said statement" (R. 93).

We must, therefore, glean as best we can the course of the proceedings from such portions thereof as are presented by this record on appeal.

A preliminary hearing was held on the petition and the amended answer thereto in the spring of 1937. On July 7, 1937 the court rendered its first opinion in the matter finding, among other things, that:

> "In 1935 Utah Construction Company did not operate the system and project as the irrigation district did so under the option to purchase * * * and in July, 1936 (the company) made and delivered a conveyance thereof to the district" (R. 33).

Nevertheless, the trial court on the same date issued its temporary injunction (R. 33) against the company as well as against the Big Lost River Irrigation District (which as stated was in no wise a party to the proceeding, restraining both those parties and their agents from in any manner interfering with the natural flow of the stream until the petitioner had first been supplied with his water right under the decree. The question of petitioner's damages was left open for further hearing at the next term of court, after which findings and decree were to be entered (R. 35).

At the beginning of the next hearing, the company moved the court, on wholly obvious grounds, to dissolve the temporary

restraining order. The motion was denied (R. 36). But in the course of such hearing, it finally became apparent to the trial court that all the allegations of the petition upon which alone the ancillary character of the proceeding purported to depend were wholly without foundation. And in its opinion of January 11, 1938 (R. 37) the court considered the whole matter anew, stating therein, among other things:

> "* * * it seems sufficient to say that the undisputed evidence shows that prior to the filing of the petition the Company had transferred all of its interest in the system and project to the Irrigation District and had ceased to operate the same and that the Irrigation District is not a party to the present proceeding".

Also the following:

> "Of course, where the Court has taken cognizance of the equitable action and the proof established the same, it will do complete justice between the parties even though it involves the granting of incidental legal rights, but that principle would not apply here, where it now appears that the Company was not doing anything or threatening to do anything as alleged in the petition as has been said, at the time the petition was filed, the Company had theretofore parted with its interest in the system and project and ceased operating it or having anything to do with it. The issues now presented have all arisen since the original case was first presented and the damages now claimed were not incidental to it, because they did not exist.
>
> "The authorities relied upon by petitioner are situations where the right to equitable relief were averred and relied upon and existed at the time the bill was filed * * *."
>
> "The conclusion then is reached that the Court cannot itself render a decree for damages under the averments of the petition and the proof as the cause is one essentially a law case and comes under Equity rule 22".

> "* * * So the present proceeding being now transferred to the law side of the Court and the petition in its present condition not stating facts sufficient to give the court jurisdiction for want of diversity of citizenship being alleged, the same will be dismissed unless the petitioner, by amendment made within 10 days alleging (alleges) sufficient facts showing diversity of citizenship * * *".

The gist and substance of the trial court's decision, as shown above, was that all those allegations of Mr. Nielson's petition which were necessary to constitute it an ancillary proceeding revelant to the interpretation or enforcement of the prior decree were wholly unfounded in fact, as shown by the evidence; that the petition, if entertained at all, must therefore be regarded as an independent action at law for damages; and as such the court would have jurisdiction of it only if there were present the ordinary grounds of federal court jurisdiction in an independent action at law—which in this case would obviously include diversity of citizenship between the parties.

In the light of these conclusions, the trial court, however, did not dismiss the petition but transfered it to the law side of the court, giving petitioner 10 days within which to amend so as to state a cause of action at law cognizable by a federal court and holding the proceeding for dismissal unless this was done. (R. 47).

Within the time limited petitioner (notwithstanding the court's leave and direction as stated above) again filed an "Amended Petition in Equity" (R. 48), reiterating the allegations previously found by the court to be wholly untrue and containing averments relative to the diversity of citizenship between the parties as follows:

> "* * * in or about the year 1929, the petitioner herein, Wilse A. Nielson became a resident and citizen of the State of Idaho residing on said land in Butte County, Idaho, and cultivating the said land as a means

> of livelihood. That the petitioner acquired said land in reliance upon the terms and the provisions of the said decree and the water rights adjudicated and determined therein and decreed to the said land for its use and benefit and appurtenent thereto, and continued to use, occupy, cultivate and farm the said land until, by reason of the acts and things hereinafter complained of as done by the plaintiff, Utah Construction Company, its officers and agents, in conjunction with other persons including the Big Lost River Irrigation District, a corporation of the State of Idaho, the crops and vegetation on said land were dried up and destroyed so that the petitioner was compelled to seek employment and residence elsewhere" (R. 52, 53).

On page 14 of appellant's brief the substance of the allegations in the amended petition relating to the allegations of diversity of citizenship are purported to be set out. The recitals in appellant's brief seem to imply at least that the amended petition recited that Mr. Nielson is a citizen of Idaho, while in fact the allegation as quoted above shows affirmatively otherwise. The Utah Construction Company is a Utah corporation. Of what state petitioner is a resident and citizen does not appear.

The amended petition sought to make the Big Lost River Irrigation District an additional party to the proceeding; sought damages against both the company and the district covering the years 1933 to 1937, inclusive, without segregation of the amount claimed against each (notwithstanding that the trial court had previously decided that the company had had nothing to do with the waters of Big Lost River since 1934), prayed for an order construing the decree and enforcing the same, and for general relief (R. 57-59). The company moved to dismiss this amended petition and to strike same from the files on the grounds therein set forth (R. 59-61).

Appellant's brief (page 15) purports to state the grounds of the motion but a comparison of the statement in appellant's brief

with the motion as shown in the printed record (R. 61) discloses the pertinent omission of one of the grounds of the motion.

The trial court, after again considering extended argument and briefs of counsel, on May 3, 1938 sustained the comapny's motion to dismiss the amended petition, stating in its opinion, among other things, the following:

> "While plaintiff in his amended petition continues to assert that the action is an equitable one and should still be heard as such, as the petition is wholly ancillary and incidental to the original proceedings initiated by the Utah Construction Company in this court, it seems necessary for the court to state again that such a position cannot be sustained after considering the allegation(s) of the original and amended petitions and the evidence, and the case will now have to be finally disposed of in accordance with the rules of, and the conclusion reached by the court in the opinion of January 11, 1938 * * *" (R. 63).

And again:

> "The petitioner here declining to amend his petition to conform to the rules and order of the court it becomes necessary for the Court to sustain the motion to dismiss and strike of the Utah Construction Company * * *" (R. 64).

In harmony with this last memorandum opinion, order was made and filed May 3, 1938 dismissing the amended petition with costs to the company (R. 64).

Memorandum of costs in the amount of $373.95 was served and filed by the company (R. 65-70); motion was made by petitioner May 24, 1938 to strike the items of the memorandum of costs except as to certain items (R. 71, 72). Later, June 25, 1938, motion was made requiring the court to make findings and to amend its order or judgment of dismissal (R. 72). Also on June 25, 1938 motion was made to strike the memorandum of costs in

its entirely (R. 73). On June 28th, the clerk considered petitioner's objections to plaintiff's memorandum of costs and taxed the company's costs against petitioner in the amount of $358.95, one item of $15.00 having been voluntarily stricken from the memorandum by the company's counsel (R. 75). Nielson appealed from the clerk's action (R. 79). In the last of the numerous opinions of the trial court upon the various phases of this proceeding, it sustained (R. 80) the petitioner's objections to all the items of the company's cost bill except those in substance assented to by petitioner in his motion (R. 71) filed May 24, 1938. The company's costs were accordingly finally allowed only in the amount of $54.60 (R. 83).

ARGUMENT

The matters discussed in this brief are treated under separate headings in the following order:

(1) Is the proceeding an ancillary one?

(2) Since the proof warranted no equitable relief, was the court justified in treating it as an independent action at law and transfering it to the law side of the court for appropriate proceedings?

(3) Was the court justified in the exercise of its discretion in dismissing the amended petition for non-compliance with the court's orders and rules?

(4) Did the court err with respect to costs?

(5) Did the court err in not making findings of fact?

THE PROCEEDING WAS NOT ANCILLARY TO THE MAIN CASE.

The decree rendered in this cause about March 15, 1923, while not set out in the record, by every justifiable inference is presumed to be a final decree. It settled the rights and priorities of the various parties to the suit in the waters of Big Lost River.

The original litigation was concluded by the entry of the decree. Every court retains inherent jurisdiction to enforce its decrees. It is pleaded in the petition and admitted by the company's answer thereto that this decree contained, among other provisions for its administration, the following provision:

> "The court hereby expressly reserves jurisdiction to supervise and enforce the administration of this decree hereafter and from time to time as occasion may require".

The foregoing statement in the decree neither added to nor subtracted from the court's inherent power and jurisdiction in this respect.

We should, therefore, state at the outset of this discussion that if the facts set out in the petition were true; that is, if the Utah Construction Company had been at the time of the filing of the petition a party claiming rights under the decree, and violating or threatening to violate petitioner's rights as set forth in the same decree, then petitioner's proceeding would have been properly ancillary to the main action and would have entitled him to relief; that is, would have entitled him (without regard to diversity of citizenship or amount involved) to appropriate equitable relief in the way of injunction against further invasion of his rights and as an incident thereto to damages, if any, suffered by past invasions of his rights. The "rights" just mentioned are, of course, the rights of petitioner as defined in the decree.

In the circumstances supposed above, the proceeding would have had to do with the enforcement of the decree; and the court would have had jurisdiction to entertain it both by reason of its inherent powers and by reason of the reservation of jurisdiction set out above. Moreover, in such a proceeding, if it were necessary in connection with such enforcement to interpret any doubtful or ambiguous provision of the decree, that too might be done as a necessary incident to proper enforcement. But, of course,

the decree could not be altered or modified under the guise of interpretation.

Moreover, if at the time of the filing of Nielson's petition the Big Lost River Irrigation District, then owning The Utah Construction Company's former water rights allotted in the decree (and thus being a party in interest under the decree) had been invading petitioner's rights under the decree or threatening further invasion or both, petitioner by proper petition could have presented a strictly ancillary proceeding against such district, entitling him as against it to proper relief. Such proceeding would have had to do with the enforcement of the decree, and been germane to the main suit and ancillary to it.

But petitioner simply sued the wrong party. Utah Construction Company at the time petitioner instituted his proceedings neither owned nor claimed any rights under the decree. As the court found under the evidence adduced, it had had nothing whatsoever to do with the use or diversion of any of the waters of Big Lost River since the year 1934. In these circumstances, the proceeding had and could have no possible relation to the enforcement of the decree and any interepretation of it in such proceeding must unavoidably be wholly nugatory and in no manner binding upon any one presently interested in the subject matter of the decree or its administration.

A decree adjudicating water rights is essentially a suit to quiet title. A perfect parallel and analogy to petitioner's unprecedented position here is the contention that a party may quiet his title to property not by suing the present owner but by suing someone who had long prior to the suit parted with all interest in the property involved.

In the light of the foregoing observations, it is apparent that all of the authorities on the subject of ancillary jurisdiction cited and quoted from in appellant's brief contain perfectly sound statements of law, without having the slightest application to this case.

The first case cited and quoted from by appellant is Fitz

Simmons v. Johnson, 90 Tenn., 415, the language quoted therefrom being:

> "Where a court has acquired full jurisdiction of a cause, it retains it until the cause is finally determined."

Appellant forgets that the cause to which this proceeding is asserted to be ancillary was "finally determined" when the decree was entered some fifteen years ago.

From Venner v. Pennsylvania Steel Company, 250 Fed., page 292, at page 296, appellant next quotes language illustrating the scope of ancillary jurisdiction in the federal court:

> "It is a supplemental proceeding (a) to protect from interference with, and to determine conflicting claims to assets, within its administrative control, and (b) to control and regulate suits brought before it and to restrain or enforce its judgments, or to further deal with the subject-matter thereof."

Certainly it cannot be claimed in this proceeding that there are any assets within the administrative control of the court to which conflicting claims are asserted or which are being interfered with by the party brought before the court. Next, the phrase above quoted "to regulate and control suits brought before it" obviously relates to pending suits and the well-understood power of a court to conduct its own proceedings and protect its jurisdiction in connection therewith. The phrase has no application here. Nor does the present proceeding have to do with restraining or enforcing a prior judgment of the court for the wholly obvious reason that the company was the wrong party to any such proceeding. Moreover, the phrase in the above quotation mentioning the ancillary power of the court "to further deal with the subject matter" of its judgments means only that a court by ancillary proceeding may further deal with matters not determined by its previous final decree or relating to matters in execution of

such previous final decree. No court has or can assert the power after final judgment or decree to deal indefinitely with the subject matter adjudicated except as necessary to execute the final decree so made.

The Venner case above discussed related to a cause still pending before the court which wrote the opinion, wherein the plaintiff had sought by supplemental bill (claimed to be ancillary to the main pending suit) to bring in an additional party and obtain relief against him, such party being a stranger to the main proceeding and not an inhabitant of the district in which the main suit was brought.

The court held that the supplemental proceeding was not an ancillary one, notwithstanding the purpose was "undoubtedly to aid the original suit".

Appellant also cites the following authorities as applicable here:

15 C. J. 822,
United States v. Eisenbeis,
112 Fed. 190,
Simkins Federal Practice,
3rd Edition, page 124,
Wichita R. R. Co. vs. Public Utilities Com.,
260 U. S. 48; 67 L. Ed. 124.

These authorities are merely to the effect that a change of citizenship while a suit is pending does not affect the jurisdiction of the court based on diversity of citizenship existing at the time the action was filed. For instance, and as typical of the above citations, the text of 15 C. J. 822 (cited by appellant supra) reads thus:

> "It is well established as a general rule that jurisdiction once acquired is not defeated by subsequent events, even though they are of such a character as would have prevented jurisdiction from attaching in the first instance * * *. But in order for this rule

> to apply, *there must be an action pending* over which the jurisdiction of the court has actually vested" (Italics ours).

But such authorities have no application here. The main case is not a pending suit. It ceased to be a pending suit when the final decree was entered more than fifteen years ago. The court's general jurisdiction of it then ceased. Such jurisdiction as it thereafter retained was strictly limited to the enforcement of its previous final decree and could be exercised only in controversies between parties interested in and claiming under the decree.

Appellant cites also and quotes from the following cases as establishing the ancillary character of the proceeding here involved:

> St. Louis San Francisco Railroad Co. v. Byrnes, 24 Fed. (2), 66, at page 69,
> Wabash Railroad Company v. Adelbert College, 208 U. S. 38, 54; 28 Supreme Court, 182, 188; 52 L. Ed. 379,
> Cincinnati Railroad Company vs. Indianapolis Railroad Company,
> 270 U. S. 107; 70 L. Ed. 490, at page 494.

In each of the above cases there were involved conflicting claims to property in the actual or constructive possession of the court through its receivers. The property involved had previously been sold under a mortgage foreclosure pursuant to decree or order in which the court retained jurisdiction to decide collateral matters such as conflicting claims to the property sold or claims upon the fund realized from its sale. In each case the controversy held to be ancillary involved conflicting claims by parties presently in interest in or to the property sold or the fund derived from its sale.

Here there is no fund or property in the custody of the court; nor are the parties to this proceeding asserting conflicting claims to any property; the company now owns no property with which

the court or cause ever dealt. Though the court reserved jurisdiction to enforce its decree and for a time it was administered through a commissioner appointed by the court who distributed the waters of Big Lost River thereunder, it by no means follows that the waters of Big Lost River were ever in the possession and custody of the court in the sense that property is taken into the court's possession and control by a receiver; and in this case, as alleged in the answer to the petition, it appears that prior to the filing of the petition the court had discharged its commissioner and turned the distribution of the waters of Big Lost River over to the state authorities pursuant to Chapter 5, Title 41, Idaho Code Annotated. And even prior to that the company had parted with all interest in the subject matter of the suit.

Appellant in his brief also cites and quotes from the following cases as sustaining his position here:

Freeman v. Howe,
65 U. S. 450; 16 L. Ed. 749, at page 752.
Krippendorf v. Hyde,
110 U. S. 276; 28 L. Ed. 145.

In each of the above cases, the proceeding deemed to be ancillary involved the claim of a stranger to the original suit upon property held by the federal court marshal under process of attachment. It was held that the ancillary jurisdiction of the court under whose process and by whose officer the property was held was sufficient to enable the court to hear and determine such third party claim. In none of the above cases do the facts have the slightest relevancy to the present case. Expressions used by the respective courts in announcing principles of law applicable to those facts set out well settled and now uncontroverted principles of law. These expressions likewise have no application here.

In this proceeding Nielson's petition, when stripped of those allegations which impelled the court initially to entertain it and which it subsequently determined were wholly unfounded in fact,

asserts merely and simply an independent action at law for damages. The fact that petitioner's rights initially grew out of a prior decree of the federal court of Idaho in no respect changed the character of his suit or enlarged the jurisdiction of that court to entertain it. Petitioner's right to sue for damages would have been the same if the decree had been rendered by any other court. That is, if his rights under the decree had been subsequently invaded he could sue for damages in the federal court if the requisite jurisdictional facts existed; if not, he could sue in any other court which had jurisdiction.

Appellant in his brief cites the case of United States v. Eisenbeis (CCA 9th), 192 Fed. 190. In that case this court quoted with approval the following language of the United States Supreme Court from Buck v. Colbath, 3 Wallace 334, 335; 18 L. Ed. 257, 261:

> "But it is not true that a court, having obtained jurisdiction of a subject-matter of a suit, and of parties before it, thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court, in some instances, requiring the decision of the same questions exactly".

See also Ralston v. Sharon 51 Fed. 702, at page 707:

> "A bill in equity constitutes an original and independent proceeding when it calls for the investigation of a new case arising upon new facts although it may have relation to the validity of an existing judgment or decree, and of the complainant's rights to claim any benefit by reason thereof, or to be relieved therefrom as the case may be."

What if the positions of the parties here were reversed? Could the company, after having parted with its interest in the subject matter of the decree, sue petitioner for damages for an

alleged violation of its previous rights thereunder, under the guise of a proceeding for the enforcement of the decree? Would not any court (if the initial pleading told the truth) have instantly concluded that such proceeding, started by a party having no interest in the decree, had no relevancy whatsoever to its enforcement? Would it not, as soon as the facts became apparent, be instantly perceived that it was an independent suit and nothing else? The same thing is true when Nielson is the moving party.

No proceeding can be relevant to the enforcement of a decree when one of the parties to the proceeding, either the petitioner or the defendant thereto, has no longer any interest in the subject matter of the decree.

When the trial court in this case determined that The Utah Construction Company had not since 1934 been a party to this decree, it was wholly right in determining that this proceeding could not be deemed an ancillary proceeding in the main suit but could be entertained, if at all, only as an independent action at law.

II

EFFECT OF THERE BEING NO GROUND FOR EQUITABLE RELIEF.

The trial court arrived at its wholly proper conclusion by a route somewhat less direct than a point blank decision on the question of whether under the facts disclosed by the evidence the proceeding was ancillary to the main suit or an independent action. Having finally determined that the uncontroverted evidence disclosed that the company had prior to Nielson's proceeding parted with all its interest in the subject matter of the former decree and that there did not exist at the time the proceeding was begun any right at all to equitable relief, it perceived the applicability of the rule uniformly announced by the Supreme Court of the United States in many cases, among which is Mitchell v. Dowell, 105 U. S. 430; 26 L. Ed. 1142. The language of that case is as follows:

> "Where a cause of action cognizable at law is entertained in equity on the ground of some equitable relief sought by the bill, which it turns out cannot, for defect of proof or other reason, be granted, the court is without jurisdiction to proceed further, and should dismiss the bill and remand the cause to a court of law."

But Mitchell v. Dowell and analogous cases were decided prior to the adoption of general equity Rule 22. The trial court thought it should instead of dismissing Nielson's petition apply to it this equity Rule 22 under the authority of several cases including Colleton Mercantile & Manufacturing Company vs. Savannah River Lumber Company, 280 Fed. 358, and American Falls Milling Co. v. Standard Brokerage & Distributing Company, 248 Fed. 487. The proceeding was accordingly transfered to the law side of the court (R. 44-46).

But viewed as an independent action at law, the trial court obviously had no jurisdiction of petitioner's proceeding without there being present allegations showing diversity of citizenship, etc. which would give the court as a federal court jurisdiction of the matter in its new aspect as an independent suit for damages. While the court might have summarily dismissed petitioner's proceeding, it did not do so; but, on the other hand, it granted petitioner leave to amend his petition so as to state an independent cause of action at law for damages. Since petitioner did not or could not make averments in his amended petition requisite to give the court independent jurisdiction, the trial court eventually arrived at the same destination as if it had in the first instance concluded from the evidence that the proceeding was in no respect ancillary to the main suit and dismissed it for that reason. Both courses of reasoning were correct and arrived at the same end.

III

DISMISSAL OF THE AMENDED PETITION WAS JUSTIFIED IN THE EXERCISE OF THE COURT'S DISCRETION FOR NON-COMPLIANCE WITH THE COURT ORDERS AND THE APPLICABLE RULES.

It is, of course, the duty of any federal court to dismiss a cause instantly upon finding that it has no jurisdiction of it as a federal court. But likewise every court of dignity and self-respect takes steps to enforce its own rules and orders and the General Equity Rules by which it is bound.

In purported conformity with the court's memorandum opinion of January 11, 1938, petitioner within the 10-day limit specified therein filed, not a complaint at law but an "Amended Petition in Equity". This was without leave of court and contrary to the court's direction. In this amended petition, petitioner asserted substantially the same allegations as those previously found by the court to be untrue according to the evidence; petitioner demanded the same equitable relief that the court had previously denied, and which appellant had previously admitted the court could not grant (R. 42), and in addition sought for the first time to bring in as a party defendant to the amended petition the Big Lost River Irrigation District. The latter is the sole party which should have been brought in in the first place if the proceeding was to be viewed as in any respect bearing on the enforcement of the decree and hence ancillary to the original proceeding. The amended petition violated the direction of the court, equivocated with respect to the allegation of citizenship, and moreover was in violation of the following equity rules:

> "Equity Rule 28 * * * After pleading filed by any defendant, plaintiff may amend only by consent of defendant or leave of the court or judge".

The amended petition as filed was not by leave of court or a judge, but in almost contumacious disregard of the court's previous direction. With respect to bringing in an additional party—the irrigation district—at this stage of the proceeding, if the amended petition had been entertained, it would have had the effect of compelling The Utah Construction Company to re-litigate matters connected with the enforcement of the decree concerning which the court had already decided that the company had no interest.

Equity Rule 26 provides:

> The plaintiff may join in one bill as many causes of action cognizable in equity as he may have against the defendant, but when there are more than one plaintiff the causes of action joined must be joint, and if there be more than one defendant the liability must be one asserted against all the material defendants * * *".

Appellant in effect urges here that his amended petition should be viewed as if it were an original petition wholly disassociated from its antecedent background. It cannot be so viewed without obvious injustice. Viewed as an original petition, it undoubtedly states on its face a cause of action, but such would have been the case even if the original petition had been filed precisely as it was before except calling it an "Amended Petition". In the light of the trial court's repeated decisions on the merits upon the entire evidence, it appeared that the company had had nothing to do with the waters of Big Lost River since 1934. Indeed the petition does not assert that the Big Lost River Irrigation District had anything to do with the matters complained about until the year 1935.

On the facts disclosed by the amended petition, any liability asserted therein against the company and the district of necessity had to be several and not joint—in violation of Equity Rule 26 above quoted.

In fact, the whole amended petition shows on its face a new attempt to impose on the court by keeping the Utah Construction Company in the proceeding as a sort of appendage to a new proceeding on its face having to do with the enforcement of the decree and ignoring the court's direction that the proceeding should be treated as a suit at law for damages against The Utah Construction Company. In this event the latter would, of course, be entitled to a jury trial.

Appellant did not see fit to appeal from the prior order of the court denying him equitable relief and transfering the cause to the law side of the court. He cannot now complain on appeal from his amended petition if the court dismissed that petition because of a plain attempt to trifle with the court and ignore its directions and the applicable rules. It does not even yet appear—on account of the equivocal character of the allegations concerning residence and citizenship—that the court does have jurisdiction.

Surely a court must have power to preserve its own dignity and self-respect.

IV

AS TO COSTS

In the order appealed from (R. 64) the court awarded the company all its costs. This order was correct, though subsequently modified by the court at appellant's insistence so as to eliminate all of the costs previously awarded to it except those in effect assented to by appellant in his motion to strike therefrom (R. 71) certain items thereof. Appellant now objects to the awarding of any costs against him on the ground that the court, having dismissed his amended petition on the sole ground of lack of jurisdiction, had no jurisdiction to award costs against him. Appellant cites (Brief, 33) controlling cases to the clear effect that "if there

were no jurisdiction there was no power to do anything but to strike the case from the docket".

But we must examine the record to see whether the cases cited by appellant are applicable here. Initially the amended petition stated facts disclosing an ancillary proceeding supported by the jurisdiction of the court in the original case. All the costs were incurred in determining on the merits of the petition as thus presented. Essential statements of fact averred in the petition being found untrue, the court decided that it could grant no relief. The proceeding was determined on the merits as an ancillary proceeding and at the conclusion of all the evidence it was found not to be an ancillary proceeding. The amended petition was dismissed, not so much because the amended petition on its face, viewed as an independent action at law, disclosed no diversity of citizenship as because the amended petition paltered and equivocated in that respect and violated the applicable rules and prior directions of the court.

In these circumstances, the trial court in the order appealed from allowed the company all its costs.

The following from the case of Smith v. Asphalt Belt Company, 267 U. S. 326; 69 L. Ed. 629, 631, is applicable here:

> "The trial court found on the evidence and as matter of law, that the railroad which had instituted and brought condemnation proceedings was an independent intrastate carrier; that it was not obliged to conduct an interstate business; and that, hence, its action in instituting condemnation proceedings without first obtaining a certificate from the Interstate Commerce Commission was not in contravention of the Federal law. It is this ground, and this only, on which the district court declared that the bill should be dismissed for lack of jurisdiction; meaning, obviously, that upon the fact found, it was not warranted in enjoining the condemnation proceedings, and not that, as a Federal tribunal, it was without power to

entertain the suit and inquire into the matters alleged in the bill".

The following cases make it perfectly clear that the trial court was wholly correct in its decree of dismissal in awarding all the costs of the proceeding to the company:

Devost v. Twin State Gas & Electric Co. (CCA 1), 252 Fed. 126;

Hazelwood Dock Company v. Palmer (CCA 3), 228 Fed. 327;

Phoenix Buttes Gold Mining Company v. Winsted (D. C.), 226 Fed. 864.

Moreover, Section 815, Title 28, United States Code Annotated, enacts that when a petitioner in equity recovers nothing he shall not be allowed his costs, but at the discretion of the court costs may be adjudged against him. When after full hearing upon the merits of the original petition the trial court here decided against petitioner, we think it approached an abuse of discretion to permit an amendment at that stage without requiring petitioner to pay the costs incurred up to that time as a condition prerequisite to filing an amended complaint setting up an action at law.

On appeal from the decision of the clerk taxing costs, the trial court in effect (R. 80) modified its final decree of dismissal by striking from the memorandum of costs the most of the items thereof—not on the ground of any impropriety in the items, but in substantial modification of its prior final decree of dismissal (R. 64). It has always been our understanding that on an appeal to the court from the clerk's order taxing costs, the matter for review by the court is the question of whether the items in the cost bill are actually proper items of cost and not a rehearing as to the terms of its previous final decree awarding costs. The reasoning of the trial court in its final memorandum opinion (R. 81) will not appeal to this court. The petitioner did not prevail with

respect to any matter raised by his original petition. The cause there set out was not divisible, and the court should upon the very threshold of the matter have determined the truth of those facts which alone could give standing as an ancillary proceeding.

The proceeding was either ancillary to the main case or it was not. If it was ancillary to the main case, the court had full authority and jurisdiction to determine all the issues, including the issue of damages. If it was not, the court had jurisdiction to determine none of the issues. If it was an independent damage suit in which the company was entitled to a jury trial, it was entitled to such trial not only on the amount of damages but on the basis for those damages; that is, whether there had been any infringement by the company of petitioner's rights. The effect of any conclusions reached by the court in its interim opinion of July 7, 1937 (R. 24) was completely rescinded by the court's final opinion of January 11, 1938 (R. 37) on the merits after all the evidence was in. After finally determining that the petition was wholly lacking in equity by reason of the fact that the company had no further interest under the decree, all the remarks in the interim opinion of the court regarding any "violations" of the decree by the company became wholly moot. They were binding on nobody—least of all upon the court. The same result would have followed if the court had determined from the evidence upon controverted allegations *that petitioner was no longer the owner of his land or water right or interested in the prior decree.*

V

SHOULD THE COURT HAVE MADE FINDINGS?

There is only one fact pertinent to the decision in this case; that is, that at the time the proceeding was brought the company was not a party in interest under the decree but had long before sold and conveyed all of its property affected by the decree.

This paramount fact is found so often in the court's repeated

opinions (R. 25, 33, 39, 43) that it would seem to leave no doubt as to the court's conclusion in the matter or that it constituted the basis of its action. In these circumstances, it is entirely sufficient if the opinions of the court, instead of an express finding, clearly states that simple fact regarding which there is no dispute. This is the holding of this court in the two decisions cited by appellant on this assignment of error.

There being no statement of the evidence before the court, it would be wholly impossible to review here the correctness of the court's determination of any fact pertinent to a decision in the case. Those matters upon which appellant requested the court to make findings are wholly immaterial. Besides, the basis of the order of dismissal was such that no findings were required in any view of the matter.

Appellee has taken no cross appeal from the trial court's order of July 13, 1938 (R. 84) modifying the order of the clerk taxing costs and fixing those costs at only $54.60. In these circumstances, it may not be compatible with the practice of this court in remanding the case to direct the trial court to allow appellee's costs in accordance with the terms of the final decree, which decree is the only matter brought here for review. If this can be done, it should in justice be done. If not, the decree of dismissal should be simply affirmed.

Respectfully submitted,

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